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# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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JOHN TRODICK,

*Appellant,*

*vs.*

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and ALBION McDONALD and AGNES AUCHARD as Administratrix with the Will annexed of David Auchard, Deceased,

*Appellees.*

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BRIEF OF APPELLANT.

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STATEMENT OF FACTS.

This is an appeal from a decree in equity made by the Circuit Court of the United States for the District of Montana dismissing on the merits the bill of complaint. The suit was brought to procure a decree adjudging that the defendant Northern Pacific Railway Company holds in trust for the complainant the title to the southeast

**SPECIFICATION OF ERRORS.****I.**

**It was error in the Court to rule or hold that the right of the complainant to the premises described in his bill of complaint was affected by or lost to the complainant by reason of his failure to file in the proper United States land office an application to enter said lands as a homestead within ninety days after the filing of the township plat of the survey of said lands, to-wit, within ninety days after the 10th day of August, 1891.**

**II.**

**It was error in the Court to hold, inasmuch as the lands mentioned in the bill of complaint were occupied by a bona fide settler at the time of the filing of the map of definite location of the defendant company's railroad, to-wit, on July 6, 1882, who, having theretofore settled on the said lands and being qualified to enter the same under the homestead laws of the United States, intended to enter the same under said laws when the same should be surveyed, any title was acquired to the said lands by the Northern Pacific Railroad Company, or its successor in interest, the defendant company, by virtue of the grant to the Northern Pacific Railroad Company.**

**III.**

**It was error in the Court not to hold or find that the lands described in the bill of complaint were excepted out of the grant to the Northern Pacific Railroad Company, under the act of congress, by reason of the fact that such lands at the time of the filing of the map of definite location of the railroad of the said company, were actually occupied by a bona fide qualified homesteader, who resided**

thereon intending to enter the said lands under the homestead laws when the same should be surveyed.

IV.

It was error in the Court to hold that the lands described in the bill of complaint were not open to entry by the complainant under the provision of the homestead laws of the United States, at the time he applied to enter the same.

V.

It was error in the Court to hold that the complainant could not claim any advantage because of the settlement and occupancy of the lands described in the bill of complaint, at and prior to the time of the filing of the map of definite location by the Northern Pacific Railroad Company of its line of railroad, for that, by reason of such settlement and occupancy, such lands were excepted from the grant to the railroad company and remained lands subject only to the preference right of the occupying claimant Lemline to enter the same under the homestead laws.

VI.

It was error in the Court not to find that in the year 1877, Martin Lemline settled upon the land described in the bill of complaint, intending to enter the same under the homestead laws of the United States, and that with such intention he continued to reside thereon until the month of August, 1889, the said lands being during all of said time and until the 10th day of August, 1891, unsurveyed land.

VII.

It was error in the Court not to find that whatever rights any of the defendants may have in the premises

were acquired with full knowledge and notice of the rights of the complainant.

#### VIII.

It was error in the Court not to find that the complainant purchased all the rights of the original occupant of the said lands, Martin Lemline, in the year 1889, and that he has continuously resided upon said land ever since said date intending to enter the same under the homestead laws of the United States, being at all said times a duly qualified homesteader.

#### IX.

It was error in the Court not to find that the complainant is and always has been ready and willing to pay to the defendant Northern Pacific Railway Company, or to the other defendants, such sum of money as was expended by them in securing from the United States the patent to the land described in the bill of complaint, and to fail to find the amount properly chargeable against complainant on account of such expenses.

#### X.

It was error in the Court to render or enter its decree herein dismissing the bill of complaint.

#### XI.

It was error in the Court not to find and hold that the defendants hold the title to the land described in the bill of complaint in trust for the plaintiff, and to fail to enter its decree adjudging that they convey the said premises to him upon the payment of such sum as the Court may find to have been expended in the procuring of the patent to the same from the government of the United States.

### ARGUMENT.

The case is controlled by the decision of the Supreme Court of the United States in

Nelson vs. N. P. Ry. Co., 188 U. S. 108, rendered since the decision by the land office rejecting the appellant's application to enter the land as a homestead.

The proposition determined in that case, bearing in mind that the Court was considering the case of land that was unsurveyed at the time of the filing of the map of definite location, is gathered from the following from the syllabus:

"Continuous occupation of public land with a bona fide intention to acquire it under the homestead laws as soon as it shall be surveyed, constitutes, when begun prior to the definite location by the Northern Pacific Railroad Company of its route, a 'claim' upon the land within the meaning of the act of congress of July 2, 1864, chapter 217 (13 Stats. at L. 365), Sec. 3, restricting the grant in and of such railroad to such odd-numbered sections within specified limits as were free from pre-emption or 'other claims or rights' at the date of definite location, and authorizing the company to select other lands in lieu of any found at that date to be 'occupied by homestead settlers.' "

Inasmuch as the land was occupied under a bona fide homestead claim at the time of the filing of the map of the definite location of the road in 1882, the grant did not attach to it at all.

The right of the Northern Pacific Railway Company to the land is to be determined by the conditions existing on the 6th day of July, 1882, when its map of definite location was filed. It became the owner of the land on

that day by virtue of its grant, or it never did. If there existed at that time a bona fide homestead claim attaching to the land, it was excepted from the grant and did not pass.

If the Northern Pacific Railroad Company had at any time prior to his death brought action to oust Lamlein from the possession of the premises, or to recover from him the value of the use and occupation thereof, it must inevitably have failed. It could not have proved title. His occupancy of the premises, claiming the same as a homestead settler at the time of the filing of the map of definite location, the land being unsurveyed, would overcome the claim of the railroad to it.

As the grant did not attach to it, as it was excepted from its operation by the conditions existing at the time of filing of the map of definite location, it remained public land subject to Lamlein's right to enter it as a homestead. If for any reason he did not enter it as a homestead, or his right to the land, for any reason, terminated, it dropped back into the general body of the public lands. The grant to the railroad company, which had become fixed and definite as to all non-mineral lands, immediately on the filing of the map, did not, after the manner of an elastic blanket, expand and take it in. It became subject, whenever Lamlein's rights terminated, to appropriation under any of the laws of the United States for the appropriation of the public domain, applicable to land of that character, to pre-emption, homestead or other similar entry.

Whether Lamlein sold to appellant his improvements on the land or attempted to sell his right to the possession, or any rights in the land, is utterly beside the question. He could transfer no rights to the land. He could, of course,

make terms with anyone as a condition of surrendering the possession and the transfer of his improvements, but this successor could acquire no right, in or to the land by reason of any conveyance or sale from Lamlein. He was in no better position than one who should take possession and occupy the premises upon their abandonment by Lamlein. But such an occupant would have a perfect right to enter the premises as a homestead. The railroad company has no right to it. Its grant never did attach to it. Lamlein's right is gone by reason of his abandonment. It is in the same condition as any other piece of public land open to appropriation by any comer.

Herein was the error of the learned trial judge. It is evident that he labored under an impression that the complainant must trace a relation of succession between himself and Lamlein, making his claim thus by relation antedate the filing of the map of definite location, and becoming entitled to the land only in case Lamlein had done everything which would entitled him to a patent. His views are thus expressed:

"By the act of congress of May 14, 1880 (Vol. 21, U. S. Statutes at Large, 140), the settler upon public unsurveyed lands, who intended to claim under the homestead laws, was allowed the same time to file his homestead application, and to perfect his original entry in the United States land office, as was allowed to a pre-emption settler to put his claim on record, and it was provided that his right should relate back to the date of settlement, the same as if he settled under the pre-emption laws. This would have given Lamlein, had he lived, ninety days after the filing of the township plat (August 10, 1891), within which time he was obliged to put his application for entry

on file, so as to become of record. He had sold, however, to Trodick in 1889, so that the very best possible position that may be conceded to Trodick is such as Lamlein could have occupied, if he had not sold, and had lived until after the plats of survey were filed. But even upon such a concession, it became his duty, as it would have been Lamlein's duty, to file his application for homestead within ninety days after the filing of the township plat in 1891. He failed to do so, though, and by his omission he lost his rights to enter the land under the homestead laws."

But the Court lost sight of what was decided in

N. P. R. Co. vs. Sanders, 166 U. S. 620,

and the application made of it in the Nelson case.

In that case it appeared that the ground in question at the time of the filing of the map of definite location was covered by and embraced in certain placer mining locations, and there were pending in the local land office applications for patents under such locations.

Really, the lands never were subject to entry as placer, and it was conceded in the action that they "did not contain gold or other precious metals in paying quantities or in such quantities as to make the same or any part thereof commercially valuable."

In fact, Sanders, asserting that the lands were non-mineral, after the map of definite location was filed, entered the lands as agricultural in character and they were patented to him.

The action of the land department in patenting the lands to Sanders was approved, the Court holding that the railroad company never got any title to them, that its grant never attached to the land involved, and that on the



extinction of the mineral claim they became subject to appropriation as other public lands.

The Court went farther and said:

“Indeed if it now appeared that the land office finally adjudged, after the definite location of the road, that the lands embraced by those applications were not mineral, they could not be held to have passed to the railroad company under the act of 1864, for the reason that they were not, at the time of such definite location, free from pre-emption or ‘other claims or rights.’ ”

As in that case, it was immaterial whether by reason of any condition then existing or by reason of any omission on their part after the filing of the map of definite location, the mineral claimants might find themselves, as they evidently did, unable to perfect their title and to obtain patent, so in this case it is immaterial whether Lamlein, after the filing of the map of definite location, by any deed of commission or omission on his part, placed himself in a position where he could not claim a patent to the land. The determinative question is, was there a bona fide claim to the land at the time of the filing of the map of definite location? If there was, the Northern Pacific Railroad Company has no right to the land under its grant, nor have its assignees, claiming thereunder.

A considerable quantity of evidence was introduced touching the question as to whether Lamlein sold to the appellant, as the latter claims, or to Houghton, who sold to appellant, as the appellees claim. It is utterly immaterial what the fact is as to this matter or whether he sold to either. The claim of the appellant is in no manner dependent upon his connecting himself either directly or indirectly with Lamlein, further than to show Lamlein's

claim to the land, his possession and occupancy with intent to enter it at the time of the filing of the map of definite location. This very matter was considered and disposed of in the Sanders case, as witness the following from the opinion :

“But it is said that no account is to be taken of those applications (of the mineral claimants) for the reason that the present defendants, who had nothing to do with them, and had no interest in them, confess in their answer that the lands in question did not contain gold or other precious metals in paying quantities or in such quantity as to make the same, or any part thereof, commercially valuable therefor; that the lands are therefore to be regarded as agricultural lands that passed to the company under the act of 1864, and were preserved to it by the filing of the map of the general route in 1872 and by their withdrawal in that year by the general land office ‘from sale or location, pre-emption or homestead entry.’ This view overlooks the fact that the express declaration of congress was that no public lands should pass to the company to which at the time of the definite location of the road the United States did not have title free from pre-emption ,or other claims or rights.’”

The doctrine thus announced, that upon the subsequent determination of the claim outstanding against any particular tract at the time of the definite location of the road, without such claim culminating in a patent, the grant to the railroad company did not open and embrace it, had, it was shown, been repeatedly asserted by the Court. The Court referred to its ruling in

Kansas R. R. Co. vs. Dunmeyer, 113 U. S. 629, in which it appeared that a certain tract of land was em-

braced in a homestead entry at the time the line of the road was definitely fixed, the grant containing reservations similar to the one under consideration. The homesteader subsequently abandoned the claim and the railroad company asserted that thereupon "the grant by its inherent force reasserted itself and extended to or covered the land as though it had never been within the exception." But the Court declined to adopt this view, and held that the land on its abandonment by the occupant became subject to appropriation like any other public land.

Reference was made to

Hasting, V. D. R. Co. vs. Whitney, 132 U. S. 357, and the following quotation made from the opinion:

"For the foregoing reasons we concur with the Court below that Turner's homestead entry excepted the land from the operation of the railroad grant; *and that upon the cancellation of that entry the tract in question did not inure to the benefit of the company, but reverted to the government and became a part of the public domain, subject to appropriation by the first legal applicant.*"

The particular proposition determined in the Sanders case to which effort has been made to direct attention is found embodied in the following terse comment on it in the opinion in the Nelson case, namely:

"In the same case the Court, after observing that as the lands there in dispute were not free from claims at date of definite location, it was of no consequence what was done with them after that date."

The Nelson case is identical in all essential respects with the case before the Court. In that case, as in this, the land was unsurveyed at the time the map of definite location was filed. It was, however, at that time occupied

by a settler with the bona fide purpose of entering the same under the homestead laws as soon as it should be surveyed. That condition, the Court held, operated to exempt it from the operation of the grant. It was excepted out of it. The grant never attached to it.

Now, the only difference between the two cases is that in that case the homesteader continued to live on the land until it was surveyed, and when it was he promptly attempted to enter it. His application was rejected, the land office holding that the land passed to the railway company under the grant. But the Supreme Court of the United States reversed the Supreme Court of Washington, holding, as above indicated, that the claim or right of the homesteader was embraced within the language "other claims or rights," in the granting act, and consequently the company got no title to it.

But in view of the decisions of the Supreme Court adverted to, the fact that the homestead claimant in the Nelson case continued, after the filing of the map of definite location, to reside on the land and promptly applied to enter it when surveyed, is of no consequence. Suppose he had not? Suppose, as in the Dunmeyer case or the Whitney case, he had subsequently abandoned it. The railroad company could assert no title to the land. It would, as said in the Whitney case, have reverted to the government and become a part of the public domain, subject to appropriation by the first legal applicant.

Suppose he had continued to reside on the land, but had neglected to make his application to enter within the time limited by the act of May 14, 1880. By no possibility, under the repeated decisions of the Supreme Court, could the railroad company be advantaged under the grant here

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involved by his delinquency. He would subject himself to the risk of losing the land by reason of the filing of an application by some other qualified appropriator, but the railroad grant had become fixed and bound many years before, and he would be in no peril from it.

There is no difficulty whatever in distinguishing this case from

**N. P. R. R. Co. vs. Colburn, 164 U. S. 383.**

In that case all that appeared was that at the time of filing the map of definite location the premises were occupied and cultivated by one Kelly. It was not shown that he made any claim to the land under any law of the United States, that he intended to enter the land as a homestead or pre-emption, nor does it appear from the opinion whether the land was surveyed or unsurveyed. If the land was surveyed and the ninety-day period within which he was required to file had expired, even if he did occupy with intent to enter as a homestead or pre-emption, it might well be held that he had no longer any "claim" or "right" to the land, and that as against any beneficiary of a grant taking effect thereafter or any legal appropriator the land was public and free from "claim" or "right." The land office appears to have believed that it was decided in the Colburn case that in order to constitute a "claim" such as would operate to exclude a tract from the grant, such "claim" must be of record in the land office. The case certainly does not so decide. It simply holds that there was not enough shown to except the land from the operation of the grant.

But the Nelson case and the case of

**Oregon & Cal. R. R. Co. vs. U. S., 189 U. S. 103,**  
now to be adverted to, point out that the homesteader or

pre-emption claimant on unsurveyed lands cannot make any filing in the land office, nor any record there, of his claim; and they hold that he cannot be prejudiced by the fact that he is afforded no opportunity under the law to make a record. It would be most unjust to the pioneer to allow his holding, which he subjugated before the railroad came, to be appropriated by it when eventually the land should be surveyed, by giving to the word "claim" in the act a significance so narrow as to exclude his most meritorious claim.

The Oregon & California Co. case reasserted the doctrine of the Nelson case, the opinion of the Court in each being written by the same learned Justice.

In that case the company sought to select the lands in question under the lieu provisions of the grant. They had been occupied previous to the survey by homestead settlers, and immediately thereafter the railroad selections were filed. Within the ninety-day period the homesteaders filed their applications, and it was held that they and not the railroad company, were entitled to the land. The case is here adverted to because it emphasizes the point decided in the Nelson case, that the "right" and "claim" of the occupant was not to be prejudiced by the fact that the lands were not surveyed at the date of occupancy.

Reference was made above to the predicament in which Lamlein would have been had he continued to reside on the land and failed within three months after the land was surveyed to file his application to enter—namely, that the land would become subject to appropriation by any legal applicant. So, if this appellee railway company should, after the expiration of the three months' period, select this tract with other lands under the lieu provisions of its

grant or under the act of 1899, commonly known as the Mount Rainier Forest Reserve act, or any other act entitling it to select lands, its superior right could not be denied. It would be in the position of any other appropriator and the rights of Lamlein would succumb.

So with appellant Trodick. He did not apply to enter within the three months' period and if after that time and before he applied to enter, any legal applicant had filed on the land, his rights would be gone. But unless intervening rights have attached it is entirely immaterial how long he delayed about making his application.

The decisions of the land department as to this have been uniform. Settlement initiates the right, and under the statute application must be filed within ninety days after the survey. But delay in doing so is immaterial unless there are intervening rights.

H. B. McLean, 6 L. D. 653.

The same principle finds very general application.

The filing must be made within three months after settlement in case of pre-emptions, but delay in doing so is of no consequence unless meanwhile some one else has filed.

Johnson vs. Towsley, 13 Wall. 72.

A pre-emption entry had to be completed within a certain limited time. After the filing of the declaratory statement, by making proof and paying for the land, but no right was lost by delay in doing so unless after the time limited and before the tender, some one else initiated a right to the land.

Chicago, Milwaukee & St. Paul Co., 9 L. D. 221.

J. B. Raymond, 2 L. D. 854.

It is likewise recognized in the law applicable to the

disposition of mineral claims. The right is initiated by discovery and marking the boundaries and must be completed under the local laws by filing a certificate within a certain time. But delay in the filing of the certificate is unimportant unless some one else locates after the time allowed and before the record is made.

1 Lindley on Mines, 390.

So there was no reason to deny appellant's application to enter the land by reason of any delay on his part in presenting it after the survey. Indeed the land office recognized no objection to the application on that ground. The action of the Commissioner was based on the Colburn case, which clearly was not governing and was misapplied.

Because it might possibly be inferred from the language of some of the opinions of the Supreme Court of the United States in construing railroad grants, as the honorable Commissioner evidently inferred from the opinion in the Colburn case, that in order to constitute a "claim" within the meaning of the word as used in the excepting clause of the Northern Pacific grant, there must have been a land office record of it, the following is quoted from the later decision in the Nelson case, namely:

"As the railroad had not acquired any vested interest in the land when Nelson went upon it, his continuous occupancy of it with a view, in good faith, to acquire it under the homestead laws as soon as it was surveyed, constituted, in our opinion, a *claim* upon the land within the meaning of the Northern Pacific act of 1864; and as the claim existed when the railroad company definitely located its line, the land was, by the express words of that act, excluded from the grant."

And then, having referred to the lands excepted as



being such subject to "other claims or rights" than pre-emption claims, and to the language of the lien clause granting the right to select in place of tracts "occupied by homestead settlers," the opinion continues:

"The words 'occupied by homestead settlers' show that congress intended by the charter of the Northern Pacific Railroad Company—whatever it may have intended as to other companies receiving grants of public lands—that occupancy by a homestead settler, with the intention to take the benefit of the homestead laws, constituted a *claim* which, existing at date of definite location, would exclude from the grant land that might otherwise be covered by it. \* \* \* If it be said that Nelson's claim was that of mere occupancy, unattended by formal entry or application for the land, the answer is that that was a condition for which he was not in any wise responsible, and his rights in law were not lessened by that fact. The land was not surveyed for twelve years after he took up his residence on it, and under the homestead law he could not initiate his right by formal entry of record until, such survey."

And then the Court shows the inapplicability of the case of N. P. R. Co. vs. Colburn, distinguishing it by the fact that in that case the settlement was made upon surveyed land and that the occupant had not shown his good faith by making his filing prior to the filing of the map, though he had an opportunity to do so.

Proof tending to show the citizenship of Lamlein was introduced, but it is unnecessary to consider its sufficiency since it has been quite generally held that in the absence

of countervailing evidence, the fact that one resides in the United States is *prima facie* proof that he is a citizen.

Jantzen vs. Arizona Copper Co., 20 Pac. 93.

Lindley on Mines, 227.

And the fact that his name was found on the election poll book, that he had repeatedly voted at elections and exercised the privileges and acted as a citizen of the United States, is proof that he was such.

Strickley vs. Hall, 62 Pac. 893.

Providence M. Co. vs. Burke, 57 Pac. 641, citing  
*inter alia*

Boyd vs. Nebraska, 143 U. S. 135.

3 Ency. of Evidence, 154.

But the inquiry is not an important one because the question is not as to whether Lamlein had an absolutely indefeasible right to the land as between himself and the government, but whether he was occupying the land intending to apply to enter it as a homestead as soon as it should be surveyed. Whether in the particular situation in which he found himself his application would have to be denied, or whether he must inevitably get the land, is immaterial.

That question, also, was decided in the Sanders case. In fact, it was conceded in that case that the claimants asserting rights to the land at the time the map was filed had no *valid* claims, that the ground was not of a character such as that it could be patented to them under the right they were asserting.

In ruling upon that phase of the case the Court quoted what had been said in Whitney vs. Taylor, as follows:

“It was not the intention of congress to open a controversy between the claimant and the railroad company as

to the validity of the former's claim. It was enough that the claim existed, and the question of the validity was a matter to be settled between the government and the claimant, in respect to which the railroad company was not permitted to be heard."

And in

N. P. Ry. Co. vs. De Lacey, 174 U. S. 622,  
the Court said:

"If there were at the time of the filing of the map of definite location an actual existing claim, even though it might turn out to be wholly unfounded, the land thus claimed would not pass by the grant."

It has been insisted that in view of the construction given to the grant and the principles controlling in the decisions referred to, it is immaterial whether any relationship is traced between Lamlein and Trodick; that the lands continued public lands free from any claim upon them by the railroad company by reason of the conditions existing when its map of definite location was filed, and that upon the subsequent termination of his claim, they were open to the first bona fide settler who should occupy them, and to entry as other public lands.

And yet it may be important, perhaps, in this action in equity in which it is sought to divest the railroad company of an apparent title to which it has no right, that there never was a time since prior to the date when its grant became fixed that the lands were in the possession of the railroad company,—never a time when they were not in the adverse occupancy of either the appellant or Lamlein, who reclaimed and improved them, appellant paying \$500 for the

improvements placed upon them by Lamlein. Even if the appellees' testimony is to be credited rather than that of the appellant, as to the transaction under which the Lamlein possession was terminated, Houghton's possession, if he ever had any, existed for only a brief period when the transfer to the appellant was made. The occupancy of the premises by the appellant and by Lamlein would have been notice to any intending purchaser of the land from the railroad company, either before or after patent, of their rights. It is a universally acknowledged principle of the law of notice that possession and occupancy of real property is as effectual as notice to purchasers as is any record.

Mullins vs. Butte H. Co., 25 Mont. 525.

There never was a time after the company might, under any circumstances, have asserted title to this land that any intending purchaser, supposing the railroad company to have title, would not have been disabused of such view by taking the precaution which is imposed on every person contemplating purchasing land to inquire of the occupant, if there is one, by what title he holds.

Nor in the problem of the construction to be given to the grant ought any particular weight to be given to the argument evidently, from the opinions, adduced to support the contention of the railroad company that insecurity must attend titles under its grant unless it can be determined from record evidence what tracts were and what were not granted.

At every stage in the history of the litigation over this particular grant this argument has been made. It was urged with special insistence in the Barden case, and predictions of disaster should the Court hold that no mineral lands were excepted from the grant save those known to

be such at the time of the filing of the map of definite location by the company were freely made by counsel representing it. The communities affected do not seem to have suffered the catastrophe prophesied.

Equally groundless are the present prophecies of evil.

While any land within the limits of the grant remains unpatented it is eminently fitting that the land department should, on the suggestion of anyone interested, listen to a suggestion that any particular tract was subject to a valid claim at the time of the filing of the map of definite location, and that for that reason the railroad company has no just claim to it. That was why the act provided for the issuance of patents,—namely, that the department might make such inquiries as it might in any manner be prompted to start as to whether any particular tract within the place limits was, for any reason, excepted from the grant. This is the principle on which the Barden case was decided.

*Barden vs. N. P. R. Co.*, 154 U. S. 288.

Such a hearing seems to have been ordered in respect to this particular tract before the patent issued to the railroad company, but on the coming in of the testimony it was ruled by the Commissioner, as a matter of law, that the title passed to the railroad company on the filing of the map of definite location, because there was no claim of record in the land office, following what was supposed to have been ruled in the Colburn case.

The railroad company certainly ought not to be heard to complain if when it applies for patent the land office calls for information as to whether the land was occupied by a bona fide homesteader or was subject to any other claim at the time of filing the map of definite location,

**or to the refusal of the department to issue it a patent for the land if it is determined that it was so subject.**

**A purchaser of the land from the railroad company before the patent issues ought not to be heard to object, because he knows that under the law the apparent title is subject to be defeated by evidence on the application for the patent that the railroad company has, in fact, no title to the land.**

**There is no hardship at all on the railroad company in this, and there is no more uncertainty in any title derived from the railroad company before patent issues than there is in a title derived from any other claimant of land to whom patent has not issued. Every purchaser in that position takes the chance that patent may never issue.**

**Hawley vs. Diller, 178 U. S. 476.**

**The government may at any time start an inquiry that may result in the conclusion that the party who seems entitled to a patent has no real claim to the land at all.**

**When the patent does issue, it is subject to attack only by some one who before it issued put himself in a position before the land office to demand and require that it go to him instead. The equity action cannot be maintained by any other.**

**The grant to the Northern Pacific Railroad Company was of a vast domain. The plainest principles of justice demanded that it should not absorb the modest holdings and improvements of those who had gone on the frontier to tame its wildness in advance of the coming of the railroad.**

**Congress was determined that it should not have, as it seeks to appropriate by its patent, the fruits of the labor**

and expenditures of Lamlein in subduing this land. It was recognized that when surveys are delayed many years, as they were in this case, that pre-emptioners and homesteaders frequently relinquish their possessions and improvements to later comers, effecting a sale for all practical purposes as though they had title. There was good sound reason for not providing by the act that in the event that land should be claimed at the time of the filing of the map of definite location and so excepted from the grant, yet if for any reason the right of the occupying claimant should thereafter be terminated before patent, the land should become subject to the grant. Congress recognized that the settler had probably done as much in his way towards the development of the country as the railroad was to do, and it did not propose to put an embargo on his disposing of his possessions and his improvements should old age overtake him before the survey was made or other necessity, or even his interest prompted him to sell.

It got a great grant, as stated. It was not intended that it should reap what others had sown. It became necessary to except in general terms lands subject to claims or rights. Certain embarrassments to the railroad company necessarily ensued by reason of the exception—the embarrassment of being met when it applied for patent by proof, any legitimate proof, that any particular tract was excepted from the grant.

Before it got its patent in this case the appellant caused the proper inquiry to be made, with the result stated.

He could only bide his time, maintaining his ~~possession~~

sion of the land until patent issued and then appeal to the Courts.

This he did.

The patent was made to the company January 10, 1903,

Trans., 21, 30.

and he began this action March 14, 1904.

The claim of the railroad company is without right and it should be so decreed.

**WALSH & NOLAN,**

*Attorneys for Appellant.*

**T. J. WALSH,**

*Counsel for Appellant.*



164 Feb 913.

# **United States Circuit Court of Appeals**

**FOR THE NINTH CIRCUIT.**

**No. 1563.**

**JOHN TRODICK,**

**Appellant.**

**vs.**

**NORTHERN PACIFIC RAILWAY COMPANY,  
ALBION McDONALD, and AGNES AUCH-  
ARD, as Administratrix with the Will Annexed  
of David Auchard, Deceased,**

**Appellees.**

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## **BRIEF OF NORTHERN PACIFIC RAILWAY COMPANY.**

### **I.**

This is a suit in equity, the purpose of which is to have it adjudged that the appellant is the owner of the southeast quarter of section 35, township 15 north, of range 4 west, M. P. M., in Lewis & Clark County, Montana, and that the patent title given by the United States to the defendant railway company, and by that company transferred to its co-defendants, is held in trust for appellant. The bill was dismissed by the court below and from the decree of dismissal this ap-

peal is taken. It will aid the court in arriving at a decision if we summarize briefly certain facts and legal principles about which there is no dispute.

The Northern Pacific Railroad Company was incorporated by Act of Congress, dated July 2, 1864, (13 Statutes at Large 365). The third section of that act (omitting immaterial clauses at the end thereof) reads as follows:

"That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, *and* whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time (of definite location), any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

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Compliance with certain conditions was, by other sections of the act, made necessary to the enjoyment of the above grant; but it appears affirmatively from the bill of complaint that these conditions were complied with. The grant thus made was a grant *in praesenti*; and upon the filing of the map of definite location, the title to the specific lands granted within the place limits attached as of the date of the grant.

*St. Paul & Pac. R. R. Co. v. N. P. R. R. Co.*,  
139 U. S. 5.

On July 6, 1882, the Northern Pacific Railroad Company filed with the Commissioner of the General Land Office its map of definite location of its line of railroad, coterminous with and within less than forty miles of the land here in controversy, which land was and is part of an odd-numbered section. It is conceded by all parties, as well as by the government, that this land is not mineral, and that at the time of the filing of the map of definite location, the United States had "full title" to it.

It is alleged in the complaint, and the oral evidence given before the Special Examiner shows, that on July 6, 1882, when this map of definite location was filed, one Martin Lammlein was living upon the land in question. He continued to reside there until his death in 1889. During all of this time the land was unsurveyed (Tr. p. 531). Before Lammlein's death appellant purchased or agreed to purchase from Lammlein the improvements which the latter had put upon

the land; and he has since continued to reside upon it. (Tr. p. 160.)

The land was surveyed in 1891, and the township plat of survey embracing it was filed in the local land office August 10, 1891. (Tr. p. 503.) On September 21, 1892, the land was listed by the Northern Pacific Railroad Company in its list No. 215. (Tr. p. 503.) No attempt was made to enter the land by any one until January 10, 1896, when the appellant applied to make a homestead entry. His application was refused upon the ground that the land belonged to the railroad company under its grant. He appealed to the Commissioner of the General Land Office, who affirmed the action of the local officers May 26, 1896, without prejudice, however, to the right of appellant to apply for a hearing to determine the status of the land July 6, 1882.

Appellant applied for a hearing August 10, 1896. The hearing was had and upon the testimony adduced the conclusion was reached by the Commissioner of the General Land Office that appellant had no right to enter the land. He was given sixty days to appeal from this decision, which was made December 24, 1898 (Tr. pp. 502-504); but no appeal was ever taken by him. On January 10, 1903, patent was issued to the defendant Northern Pacific Railway Company, as successor in interest to the Northern Pacific Railroad Company.

The contention of counsel for appellant is that upon the foregoing facts this case is ruled by the decision

of the Supreme Court in the case of *Nelson v. Northern Pacific Railway Company*, 188 U. S. 108; and that the land, having been occupied by Lammlein on July 6, 1882, when the map of definite location was filed, was excepted from the railroad company's grant, even though no entry was ever made by Lammlein, and though no entry was ever made or sought to be made by appellant himself, until four and one-half years after the completion of the survey.

In the Nelson case, as in the case at bar, the land was unsurveyed when the map of definite location was filed. The plaintiff Nelson occupied the lands at that time; *but as soon as the land was surveyed* (and we ask the court to note the stress which, throughout the opinion, Mr. Justice Harlan places upon this fact) Nelson *at once* attempted to enter it. The act of May 14, 1880, cited and relied on by Mr. Justice Harlan in his opinion in the Nelson case, gives the homesteader ninety days after the completion of the survey in which to make his entry, and *within this period* Nelson entered, or applied to enter the land in question.

This is the vital distinction between the Nelson case and the case at bar. In the Nelson case there was *of record* in the land office, within the period allowed to all homestead settlers in which to make their entries, an application to enter the land in question, and the good faith of the occupant of the land had been attested *of record*. In the case at bar no entry whatsoever was made by Lammlein, and his occupancy, which is relied on to except the land from the grant,

had, by his own act in selling to appellant, been affirmatively shown to be without intention to enter under the homestead law.

Previous to the decision in the Nelson case, it had been held by the Supreme Court of the United States, in *Northern Pacific Railroad Company v. Colburn*, 164 U. S. 383, that the only occupancy of an odd numbered section of land within a railroad grant, which could operate to except such land from the grant was an occupancy of which the good faith was manifested by an entry in the local land office. In his dissenting opinion in the Nelson case, Mr. Justice Brewer insists that the rule thus laid down in the Colburn case was meant to apply to all cases of occupancy of surveyed or unsurveyed land; but Mr. Justice Harlan writing the opinion of the majority distinguishes the Colburn case from the Nelson case by pointing out that in the Colburn case the land was surveyed and the occupant might have entered it, and his failure to enter it was conclusive evidence of a lack of good faith; whereas, in the Nelson case, the land was unsurveyed at the time of filing the map of definite location, and therefore the occupant could not enter it at that time. But the point is (and, as said above, Mr. Justice Harlan himself lays special stress upon and italicizes the fact), that Nelson did seek to enter the land *promptly on the completion of the survey*, and thus got his claim of record as soon as it was possible for him to do so.

Amid all the confusion in which the law relating to railroad grants is involved (and this confusion is

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evidenced by the numerous dissenting opinions in the cases construing these grants), the following four principles may be said to be firmly settled.

1. That as to land within the *place* limits of the grant, the title of the railroad company attaches to the definite sections within those limits, on the filing of the map of definite location; and that as to lands which at that time were not occupied by homestead settlers or within the other excepted classes the railroad company's title takes effect as of the date of the grant.

*St. Paul & Pac. R. R. Co. v. N. P. R. R. Co.*,  
139 U. S. 1.

2. That as to lands within the *indemnity* limits of the grant, (i. e., those limits to which the company may resort for lieu lands to make up for deficiency in its place limits caused by homestead occupancies, etc.,) no rights are acquired by the railroad company, by the filing of the map of definite location, but the title of the railroad company to such lands first attaches when the lands are selected by it and the selection is regularly filed with the proper land officers.

*Oregon & C. R. R. Co. v. U. S.*, 189 U. S.  
103.

3. That as to all lands within the place limits of the grant, which have been *surveyed* when the map of definite location is filed, the question whether there is such a homestead or other occupancy as will prevent the grant from attaching to them, is determined

absolutely by the condition of the records of the land department at the time when that map is filed, and if at that time no entry is made, the lands are conclusively presumed to be free from any occupancy that would prevent the grant from attaching, and no one will be heard to say that they were in fact occupied.

*Northern Pacific R. R. Co. v. Colburn*, 164  
U. S. 383.

4. That as to lands within the place limits of the grant, which are *unsurveyed* when the map of definite location is filed, the records of the land department, at the time of the filing of such map, are *not* conclusive upon the question of homestead occupancy, because, at that time, the lands being unsurveyed, there could of course be no record of their entry, or attempted entry in the land office. And as to such lands an application to make a homestead entry of them *within the time allowed by the Act of May 14, 1880, viz., ninety days after the filing of the township plat of survey*, will operate to take them out of the grant.

*Nelson v. N. P. Ry. Co.*, 188 U. S. 108.

If in the fourth proposition above stated, we have correctly represented all that was held in the Nelson case, it is obvious that the appellant cannot prevail. The lands in question are within the place limits as distinguished from the indemnity limits of the Northern Pacific grant. Appellant's sole reliance is upon the doctrine announced in the Nelson case; but he



does not bring himself within it for the reason that the *bona fide* character of Lammlein's occupancy of these lands has never been attested by *any entry in the land office*, and all that we know concerning that occupancy, or concerning the right of Lammlein to enter them, or his intention to enter them, is what is advanced by way of oral testimony years after the survey was completed and the privilege of entering these lands accrued and expired.

We contend that the rule to be gathered from a reading of the Colburn case and the Nelson case is simply this: that as to surveyed lands, the question of occupancy or non-occupancy is determinable by the condition of the record at the time when the map of definite location is filed; and that as to unsurveyed lands, the question of occupancy is determinable by the condition of the record ninety days after the completion of the survey and filing of the plat in the local office.

It is true that the court in the Nelson case does not in terms rest Nelson's right to the lands in question upon the fact that in addition to his occupancy he made application to enter promptly upon the completion of the survey and the filing of the plat; but such is the necessary inference. The court certainly did not mean that it was a matter of *indifference* whether this application to enter is promptly made or not, for, if it did mean this, Mr. Justice Harlan would not have laid so much stress upon the fact that the application was promptly made. Again and again in the

course of the majority opinion, the fact is adverted to and italicized that as soon as Nelson could apply to enter the lands he did so.

That this is the correct view of what was decided in the Nelson case appears very clearly from the only decision since rendered by the Supreme Court of the United States, in which, so far as we can find, this question has been considered or the doctrine of the Nelson case applied. We refer to the case of *Oregon & California R. R. Co. v. U. S.*, 189 U. S. 103, decided in April, 1903. That case involved the construction of a railroad grant, identical in its terms (so far as regards the present controversy) with the Northern Pacific grant; and in that case, as in the Nelson case, the railroad company had received patents from the government under its grant to the lands in question. That case involved lands within the indemnity limits of the railroad company's grant. These lands had been occupied for a number of years previous to the completion of the survey by homestead settlers. Immediately upon the completion of the survey and before any claims by the homestead settlers were filed, the railroad company selected the lands. After such selection, *but within the ninety days allowed by the act of May 14, 1880*, applications to enter the land as homesteads were made by the occupants. Mr. Justice Harlan, in holding that the rights of the occupants under these circumstances were superior to those of the railroad company, adverted again to the decision in the Nelson case, written by him but a few months before, and said:

"3. But it is contended that as the selection by the company (except as to the tract which was occupied in 1869, before any selection by the company of lieu lands) was prior to the application by the respective settlers for entry under the homestead laws, its right to the lands in question was superior to that asserted by the settlers. This view is completely met by the fact that the settler, by prior occupancy in good faith, could avail himself of the homestead acts whenever, by an official survey, the way is opened by the government for him to do so, *and by the fact that, within ninety days after these lands were surveyed*, he filed in the proper office his application to enter them under the homestead laws of the United States. He moved *with due diligence* to protect and perfect the right acquired by his occupancy of the land with the intention to avail himself of the benefit of those laws. That right was not to be affected or impaired by the fact that the lands were not surveyed at the date of occupancy. *Nelson v. Northern Pac. Ry.*, 188 U. S. 108, ante 406, 23 Sup. Ct. Rep. 302; *Ard v. Brandon*, 156 U. S. 537, 543, 39 L. Ed. 524, 526, 15 Sup. Ct. Rep. 406, 409; *Tarpey v. Madson*, 178 U. S. 215, 219, 44 L. Ed. 1042, 1044, 20 Sup. Ct. Rep. 849, 850. In the *Ard* case, the court said:

"The law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon. If he does all that the statute prescribes as the condition of acquiring rights, the law protects him in those rights, and does not make their continued existence depend alone upon the question whether or no he takes an appeal from an adverse decision of the officers charged with the duty of acting upon his application.' In the *Tarpey* case it was said that 'the right of one who has actually occupied (public lands), with an intent to make a homestead or preemption entry, cannot be defeated by the mere lack of a place in which to

make a record of his intent; that if a settler was in possession before definite location, 'with a view of entering it as a homestead or preemption claim, and was simply deprived of his ability to make his entry or declaratory statement by the lack of a local land office, he could undoubtedly, when such office was established, have made his entry or declaratory statement in such way as to protect his rights.' So, if the condition of the lands, being unsurveyed, prevents the making by a *bona fide* occupant of a proper application of record to enter them under the homestead laws his rights will not be lost, if, after the lands are surveyed, he applied *in due time* to enter the lands under those laws. And such has been held to be the object and effect of the act of May 14, 1880, c. 89, 21 Stat. 140 (U. S. Comp. Stat. 1901, p. 1392). We could not otherwise adjudge in this case without holding that the mere selection of the lands by the railroad company displaced or destroyed the rights of a *bona fide* settler arising from previous occupancy with the intention of making the required homestead entry whenever he was permitted to do so. We cannot so hold. We adjudge that the rights which *bona fide* occupancy gave to the settler under the act of 1866 are not defeated by a mere selection afterwards of the lands by the railroad company—the settler having, after the lands were surveyed, *promptly* taken the necessary steps to protect his rights under the homestead laws. And in such case, the entry made under those laws, relates back to the date of settlement on the lands. It was so substantially held in *Nelson v. Northern Pac. Ry.* (188 U. S. 108, ante 406, 23 Sup. Ct. Rep. 302.)"

Here the superiority of the occupants' right is expressly rested upon the fact that they moved within the period allowed them by the Act of May 14, 1880.

The importance of the case at bar is not to be measured by the amount of land involved in it, and we

earnestly ask the court in deciding it to keep in mind *the principle* which counsel for appellant are seeking to establish, and to consider how very far reaching would be the consequences of an authoritative announcement of that principle as one of railroad grant law. That principle is that it is allowable at any time for any one to come into a court of equity and overthrow the patent title of the Northern Pacific Company to any of the lands within its grant on a mere *oral showing* that on the day when the map of definite location was filed opposite them, the lands were unsurveyed, and A or B or C was living upon them, intending to enter them as a homestead. The occupant, as in the case at bar, may have been dead when the survey was completed; the question of his citizenship and of his right to enter them may, as in the case at bar, be left altogether unsettled; the question of his intention to enter them at all may, in fact necessarily would, as in the case at bar, have to be resolved by oral testimony, and that of a hearsay character; the impossibility of successfully meeting and overcoming such testimony concerning events so remote would be obvious; and yet, to a showing of such a character, according to counsel's contention, the patent rights must yield.

The Supreme Court, we respectfully insist, has not meant in the Nelson case to affirm any such principles as these. That case must be read in connection with the unanimous decision of that court in the case of *N. P. R. R. Co. v. Colburn*, 164 U. S. 383, which

latter case has never been repudiated by the Supreme Court. Mr. Justice Harlan expressly refers to it in the Nelson case, and approves of the doctrine announced in it; and the effect of the two cases read together is, as we have above stated, that in the case of surveyed land, the question of occupancy turns on the condition of the record at the time of the filing of the map of definite location, and in the case of unsurveyed lands, that question turns upon the condition of those records ninety days after the completion of survey and the filing of the township plat. In each case occupancy and intention to enter must be attested by record evidence; the only difference is as to the time allowed in which to place the entry of record.

It will not be contended by counsel, in the face of the decision in the Colburn case, that as to *surveyed* land the occupant of it has any right as against the railroad company unless his entry is of record when the map of definite location is filed; his rights are fixed absolutely by the condition of the record at that time. He may be able to advance excellent excuses for not having it of record at that time, but those will not avail him. The hardship that might result in a particular case by the application of the rule would have to give way to the necessity of having a definite and fixed time at which the question of occupancy or non-occupancy must be settled.

Why is the necessity for such a rule any less in the case of lands *unsurveyed* when the map of definite location is filed? Why should there not be a fixed time

in the case of such lands when the settler's right either as against the government or the railroad company must be definitely and formally asserted? And what other period of time can this be than the period of ninety days after the filing of the township plat, which is fixed by the Act of May 14, 1880?

It will be said that Lammlein's failure to appear and enter the lands in question is explained by the fact that he died before the survey was completed; and the evidence certainly does show (Tr. p. 160) that Lammlein died in 1889, two years before the survey was completed and the township plat filed. We shall show in the second subdivision of this brief that even though Lammlein had lived until the completion of the survey, he could not have entered; that he had in fact during his lifetime sold all his rights in it to appellant, and that this absolutely disqualified him as an entryman, and negatived the idea that his occupancy of the land was in good faith or with any intention to enter it as a homestead. But putting this aside for a moment, we respectfully submit that this very contention does but accentuate the necessity for the rule for which we are contending, and which, as we insist, the Nelson case supplemented by the Oregon & California Railroad case lays down. As stated above, if the rule for which counsel contend is correct, there is not a patent ever issued to the Northern Pacific Railroad Company that may not be overthrown on a mere oral showing that on the date when the map of definite location was filed, A or B was in possession of the

land covered by the patent "intending to enter it as a homestead," *and that he died the next day.*

That is the *principle* contended for here; and it is not in point to say that the showing in fact made is stronger than this; that Lammlein is shown to have lived for years upon the land and to have built extensive improvements upon it. All this may be true, but the principle invoked necessarily remains the same. The rule once established, any patent to the Northern Pacific Company may be overthrown by any one on an oral showing of occupancy at the time of filing the map of definite location, and an oral showing of the good faith and qualifications of the occupant. The strength of the showing made would of course vary in different cases, but in all cases the patent would be open to the attack. The announcement of such a rule would be utterly destructive of titles. The Supreme Court of the United States has never announced it, and the stress which it has placed upon diligence in placing of record written evidence of these facts negatives it.

But even if death had prevented Lammlein from entering the land within ninety days after the survey, this excuse cannot be made for the appellant's failure to enter within that period. He claims to have succeeded to Lammlein's rights. He was in possession of the land when surveyed in 1891, and never applied to enter it until four and one-half years thereafter. He, as the successor of Lammlein, might have asserted his rights during the ninety days after the township



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plat was filed; he failed to do so. By his failure to do so, his rights expired under the Act of May 14, 1880, certainly as against the United States, and we insist that they expired equally as against the grantees of the United States.

We submit, therefore, that when, after the expiration of ninety days from the filing of the township plat, there was no entry or application to enter these lands of record in the land office, the title of the railway company to them became absolute, and that appellant is not entitled to the relief sought.

## II.

The foregoing considerations are all addressed to the important question presented in this controversy by the bill itself. We insist that, conceding the truth of everything stated in the bill, the appellant is not entitled to the relief sought. If, however, it should be held that the rule announced in the Nelson case is applicable, and that lands are taken out of the Northern Pacific grant by an oral showing that on the date of the filing of the map of definite location they were unsurveyed, and were in the occupancy of someone who thereafter died before the completion of the survey; and it should further be held that the failure to assert any rights in such lands for a period of ninety days after the completion of the survey was a matter

of no moment, and that the title of the railway company or its grantees may be challenged at any time, then we submit that on the *evidence* offered the appellant is not entitled to the relief sought.

The kind of occupancy that will operate to except land from the grant is an occupancy by a qualified entryman, who does, in good faith, intend to enter the lands. This is recognized in all cases, in the Nelson case as well as others; and in that case the qualifications and good faith of Nelson were stipulated as facts. The occupancy of Lammlein was certainly not such as would except the lands from the grant unless he was qualified to enter the land when it was surveyed, if he had lived; and if appellant has not shown that on the filing of the township plat on August 1, 1891, Martin Lammlein might, if he had lived, have entered the land, he has not shown facts sufficient to except the land from the grant. He has not shown this for the following reasons:

1. It is not shown that Lammlein was a citizen of the United States. It is affirmatively shown (Tr. p. 84, 92) that he was a native of Germany and returned to Germany on a visit in 1871. If he ever became a citizen of the United States then, it was by becoming naturalized, and of this his naturalization papers would be the only proof. The testimony of his having voted and other testimony of a similar character referred to in the brief of appellant (all taken over our objection) is utterly incompetent to establish the fact of his citizenship.

2. It is not shown that Lammlein was not the proprietor of more than 160 acres of land in any state or territory. An applicant to enter lands as a homestead must show this fact affirmatively, and one who cannot show it, is not a qualified entryman. (See Sec. 5, Act of March 3, 1891, 26 Statutes at Large, 1095.)

3. It is shown affirmatively that before his death Lammlein abandoned the land and sold, or agreed to sell his squatter rights in it to appellant. (Tr. p. 179.) This absolutely disqualified him as an entryman. (See Sec. 2290 Revised Statutes, as amended by Act of March 3, 1891, 26 Statutes at Large, 1095.)

Again, it must be remembered that this is not an action by the government to cancel a patent. In such an action all that need be shown is that the patentee is not entitled to the patent issued. Here, however, what is claimed is not only that the railway company is not entitled to the patent, but that appellant is, and in order to prevail, both of these facts must be established. It is not enough to show that the patent has been wrongfully or improvidently issued. If that were true, that is the concern only of the government. The appellant must show more, and unless he shows that *he* is entitled to the patent issued to the railway company, his bill must be dismissed, whatever rights the government might have by an independent suit to cancel the patent erroneously issued. These principles are well established and have been announced in so many cases that we need cite only a few of them.

*Bohall v. Dilla*, 114 U. S. 47;

*Sparks v. Pierce*, 115 U. S. 408;

*Lee v. Johnson*, 116 U. S. 48.

This being so, the appellant's case necessarily fails by a total absence of any evidence that he is not the owner of 160 acres of land in any state or territory, as required by Section 5 of the Act of March 3, 1891, *supra*.

### III.

Finally, waiving all other considerations, appellant has throughout the entire period since his connection with this land began, exhibited a degree of indifference to the establishment of his alleged rights in it that in itself, on old and well recognized principles, must be fatal to his case. He is in this court asking *equitable* relief. He is asking that the legal title which the government has given to the railway company, and through it to its co-defendants, be taken from them and declared to be held in trust for him; and that defendants, who have expended large sums of money in the improvement of this property on the faith of the legal title and of his acquiescence in it, surrender all these improvements to him. If he is entitled to this relief, it can only be because he has consistently and without interruption asserted and sought to establish his right to the land; or, if there has been any suspension of effort in this direction, then that this suspension be explained, or justified, or accounted for. He

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cannot sit idly by and without protest let the legal title go into other channels; allow money to be expended on the faith of that title, in the disposition of which he apparently acquiesced, and then, years afterward, come in and challenge it.

The maxim is elementary that equity aids only the vigilant, not those who slumber on their rights. The legal title to this land is in these defendants. That title is questioned by appellant and by him alone. It was first formally questioned by him in 1896, when he contested in the land office the right of the railway company to have it. But if he submitted to the decision of that contest; if he acquiesced in it; if he thereafter apparently abandoned his claim to the land, those who were in possession of that legal title were justified in acting upon that apparent abandonment of it; and if they did so, and spent money on the property in consequence, they are at least as much entitled as appellant is to the equitable consideration of this court. In the light of these principles, let us see how the case stands.

According to his own testimony, appellant purchased Lammlein's rights to the land shortly before Lammlein's death in 1889, and thereafter claimed to be the owner of it. (Tr. p 179.) The land was then unsurveyed. It was thereafter surveyed and a township plat of survey was filed in the local land office August 10, 1891. His failure to do anything to establish his rights between 1889 and August 10, 1891, of course does not tell against him, because until the plat was

filed he could do nothing. But after that plat was filed it became his duty to act promptly. The law gave him only ninety days in which to assert his claim. He made no effort whatsoever to assert it until January, 1896. (Tr. p. 502.) The local office rejected it, but he appealed and followed his claim up until December, 1898, when the Commissioner of the General Land Office decided against him, *allowing him, however, sixty days in which to appeal to the Secretary of the Interior from that decision.* He never took any appeal. He never thereafter made any move of any kind to assert his title until more than five years thereafter, when he filed this bill. In the meantime the other defendants in this action, or those claiming under them, had made extensive improvements on the land (Tr. p. 257-259, 349-351), all made after the decision of 1898 and in reliance upon appellant's apparent acquiescence in that decision and upon the legal title which they held; and appellant stood by and saw these improvements made, and allowed more than five years to elapse before asserting his "equitable" rights in the land on which they were made.

The authorities are very clear, we think, that under such circumstances he is not entitled to equitable relief, and no court has been more firm and clear in its announcement of this doctrine than the Supreme Court of the United States. The case of *Gallihier v. Cadwell*, 145 U. S. 368, is directly in point here. In that case it was held that where one asserting homestead rights in property stood by and saw costly improve-

ments made upon that property, and made no effort to assert his claim, equity would not interfere to give him relief. The same doctrine has been announced by the same court in many other cases:

*Twin Lick Oil Co. v. Marbury*, 91 U. S. 587;

*Wood v. Carpenter*, 101 U. S. 135;

*Hammond v. Hopkins*, 143 U. S. 224;

*Felix v. Patrick*, 145 U. S. 317;

*Foster v. Railroad Co.*, 146 U. S. 88;

*Johnston v. Standard Mining Co.*, 148 U. S.

360;

*Halstead v. Guinnan*, 152 U. S. 412;

*Abraham v. Ordway*, 158 U. S. 416;

*Penn. Ins. Co. v. Austin*, 168 U. S. 685;

*Badger v. Badger*, 69 U. S. 94;

*Harwood v. R. R. Co.*, 84 U. S. 78;

*Ward v. Sherman*, 192 U. S. 168.

In nearly all of the above cases there was involved actual or constructive fraud on the part of those holding the legal title; and yet the court held that even fraud would not excuse long delay in the assertion of equitable rights where property had been improved on the faith of the legal title and of the apparent acquiescence of the complainant in that title.

It is true that in some of the cases above cited the period of delay was much longer than in the case at bar. In others, however, it was even less; but this is a matter of no special importance, because as said by the court in *Insurance Co. v. Austin*, *supra*, "the rea-

son upon which the rule is based *is not alone the lapse of time* during which the neglect to enforce a right **has** existed, but the changes of condition which may **have** arisen during the period in which there has been **neglect.**" And again in the case of *Gallihier vs. Cadwell, supra*, the Supreme Court, speaking through Mr. Justice Brown, after citing a number of cases in which the above doctrine had been laid down, said:

"They (these cases) all proceed upon the theory that laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."

No explanation is offered of the delay in this case. The claim that it is excusable because the Nelson case was not decided until 1903 cannot be countenanced. The Nelson case did not make the law. It simply affirmed a principle which was law already, which (we must assume) would have been affirmed in 1889, as certainly as it was in 1903, and which would have been announced in the case of *Trodick v. Northern Pacific* as certainly as it was in the case of *Nelson vs. Northern Pacific*, had the former case been first begun. Whatever may be our practical views of that decision, it is certain that it can never be regarded theoretically as having the effect of legislation. It would be subversive of our whole theory of jurisprudence, if decisions should ever be regarded as *making* law. We, of course, do not concede that the Nelson



case applies to the facts developed in the present one; and our entire argument under the first subdivision of this brief has been addressed to the proposition that it does not; but if it did, it would be a most dangerous and unheard of doctrine to hold that a litigant is justified in postponing the assertion of his rights until some one else has obtained a decision, the effect of which is to make it easier to establish them.

WM. WALLACE, JR.,  
CHARLES DONNELLY,  
Solicitors for Northern Pacific Railway Co.







164 Fed. 913.

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No. 1563.

IN THE

# United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

JOHN TRODICK,

Appellant,

vs.

THE NORTHERN PACIFIC RAILWAY COMPANY,  
a Corporation, and ALBION McDONALD and  
AGNES AUCHARD, as Administratrix with the Will  
Annexed of David Auchard, Deceased,

Appellees.

## REPLY BRIEF OF APPELLANT.

The appellees, admitting that if the land in question was occupied by a bona fide homestead settler on the 6th day of July, 1882, intending to file as soon as the land should be surveyed, it was excepted from the grant to the Northern Pacific Railroad Company, advance the contention that either the fact of occupancy or the bona fides of the purpose of the settler to enter is to be determined, not by evidence such as would ordinarily be considered as tending to establish such facts, but by whether the land office record shows, within three months of the filing of the plat of the survey, an entry by the person occupying the land at the time of the filing of the map of definite location. Nothing that was said in the Nelson case or in

N. P. Ry. Co. vs. McCormick, 94 Fed. 932,

by this court, anticipating the decision of the Supreme Court of the United States, nor anything that can be gathered from its earlier decisions, lends any support to such alleged rule of evidence.

It is true the learned Justice writing the opinion in the Nelson case makes reference a number of times to the fact that the settler made his filing as soon as the land was surveyed. That was one of the facts of the case. It was a circumstance clothing his case with a special equity. It would have been harsh indeed to take from him, under those circumstances, the home he had established and improved before the railroad company had earned any right to the land by building into the region in which it lay.

But there is absolutely nothing in anything that was said by the court or in the conclusion that was reached that could lead to the conclusion that the fact adverted to was vital to the case, and the reasoning by which the court awarded Nelson the land forbids the belief that it was vital to the case. The line of reasoning compels the conclusion that the railroad company's right to the land was utterly gone years before, that it never did attach, by reason of his occupancy at and prior to the filing of the map of definite location. And there is nothing that can possibly induce the belief that the company's right being gone, the court considered his own right to the land would be any the less clear though he had delayed beyond the three months' period in making his filing.

That his right to the land, except against claims initiated intervening the filing of the survey and his own application to enter, would not be prejudiced by any delay, was expressly ruled by the Supreme Court of the United States in

Whitney vs. Taylor, 158 U. S. 85; and in  
Lansdale vs. Daniels, 10 Otto, 113.

The Court referred to the fact that he did apply to enter as soon as the plats were on file, rather to show that though entrymen in general occupied a position of so much equity, the construction of the grant contended for by the railroad company would deny to them the land that had been made valuable by their pioneer efforts.

The fact was by no means vital, but it was important as showing the inequity that would be wrought if any construction other than that given the grant by the court should be adopted.

There are many reasons for rejecting the rule of evidence which appellees seek to have established.

In the first place there is no sort of relation between the recitals of the application to enter by a homesteader, filing in 1891, and either his occupancy in 1882 or the bona fides of his intention to enter the land as a homestead when surveyed.

The application to enter as a homestead, unlike the declaratory statement of a pre-emptioner, says nothing at all about when the applicant settled on the land.

Sec. 2290, R. S. U. S. (As amended by Act of 1891.)

The pre-emptioner could not file his declaratory statement until he had settled on the land. The homesteader files as the initial act in the acquisition of title, though in a contest with another claimant he may insist on a right to the land as of his date of settlement, if that antedated his filing.

It is strange that the absence of an official document which says nothing at all about settlement or occupancy,

**even** at the time it is filed, should be deemed conclusive **proof** that land was not *occupied by a homestead settler* **nine** years before.

Reference is made in this connection to

N. P. R. R. Co. vs. Colburn, 164 U. S. 383; and

N. P. Ry. Co. vs. DeLacey, 174 U. S. 622.

**In** the former it was not held that the want of a filing **in** the land office was proof either of non-occupancy or **want** of good faith. The land had been surveyed. Under **the** circumstances an opportunity existed to file and the **occupant** did not file. The holding was that the rights of **the** railroad company having attached while the occupant **was** in default, he was to be deemed to have no claim, **just** as if the map of definite location in this case had **been** filed after 1891, the complainant would be deemed to have no *claim* to the land.

**In** the DeLacey case the ruling was quite in keeping with the same theory.

**The** Court held that though there appeared on the records of the land office at the time of the filing of the map of definite location a pre-emption declaratory statement, as the time had gone by within which proof should have been made when the map was filed, its vitality was gone and it could not be considered as constituting a claim.

**The** holding in these cases was not that the absence of the requisite record was conclusive proof of non-occupancy, abandonment or want of good faith, but that under the circumstances whatever claim there ever had been had expired, no longer existed at the critical period, —the date of filing the map.

**The** real ground upon which this court decided the DeLacey case was that though the record showed the



existence of a pre-emption filing at the time the map was filed, it could be and was shown that the settler had actually *abandoned* the claim before that time.

N. P. Ry. Co. vs. De Lacey, 66 Fed. 450.

Inferentially, at least, it held that the fact of a subsisting claim at the time of the filing of the map of definite location, of occupancy, and every other fact entering into the question, could be shown by any relevant testimony.

The case of

Tarpey vs. Madsen, 178 U. S. 215,

may as well be mentioned here, since some support for the position of the appellees is claimed for it. In that case the map of definite location was filed October 20, 1868. At that time there was no land office in which the pre-emptioner could file. The office was opened some time in April or May, 1869. On May 29th, one Olney filed a pre-emption declaratory statement, alleging settlement April 23, 1869. It will be noticed that the date of settlement *as recited* was after the filing of the map. Olney afterwards abandoned the land and Madsen homesteaded it after it had been *for years in the possession of the railroad company*.

The court held that waiving the question as to whether it could be shown that Olney had, in fact, contrary to the recital of his declaratory statement, settled on the land prior to October 20, 1868, as the evidence tended to show, there was nothing in the record to establish, as a fact, that his occupancy of the land prior to that date was with intent to acquire title to it from the United States.

None of these cases afford any support to the novel rule of evidence which the appellees assert.

To resume the discussion of the reasons which forbid its acceptance.

Proof that a man did not make a filing upon a certain tract of land in 1891, except by operation of an arbitrary rule of law, is certainly no proof that he did not occupy it in 1882, and is only the feeblest kind of evidence, if it is evidence at all, that occupying it, if he did in 1882, he then had no bona fide purpose to enter it.

He had abundant time meanwhile to change his mind. Any one familiar with the development of our country knows how often the settler has taken up his residence upon a piece of land, filled with hope and the fixed purpose of acquiring title to it, and after attempting for a time to make a living off it, and then give up the struggle and abandoned it, to be taken again possibly by later comers.

Even if Lemline had abandoned this land, say in 1889, as is charged in the brief of appellees, that fact would not establish that he did not have a bona fide intent to acquire the land in 1882. But he died before the land was surveyed and sold the place on his death-bed to appellant. Had he continued to live on the land until after 1891 it might be permitted to submit in evidence that his failure to enter *promptly* when he had an opportunity was evidence that he never intended to enter. But he died and, anticipating his death, sold the place. Certainly Trodick's failure in 1891 to enter is no proof that Lemline had no intention in 1882 to do so.

The rule contended for would give to the railroad company the benefit of the labor and toil of every settler going on an odd-numbered section before the survey and the advent of the railroad, if he happened to die after the filing of the map of definite location, while waiting for the government to complete the survey.

If the only competent evidence of the good faith of

the occupant at the time of the filing of the map of definite location is, as contended, the making of a filing by the party who occupied the premises, within three months after the survey is filed, such proof must inevitably be wanting if he dies meanwhile.

Oftentimes land so appropriated and improved by the pioneer becomes of great value before the survey.

But it is not only in cases where death intervenes that the railroad would enrich itself through the labor of others under the rule contended for.

In every case where the original occupant sold his place a similar result would ensue. In fact, that is just what is claimed in the brief in this case, that Lemline having sold the place, he thereby abandoned it and disqualified himself from entering it, so it belongs to the railroad company. Congress never could have intended to work such oppression. It would be wanton disregard of the rights of a most deserving class of citizens if the sale of his holdings by a settler, prior to survey and after the filing of the map of definite location, should operate to devote the land, against the claims of his successor, to the railroad company. Such a holding would, of course, forbid all such sales. If old age and incapacity came before the survey, the settler can not dispose of his holdings, or let any one into possession. By the very act of his attempted disposition the railroad right attaches. This will not do.

The Supreme Court of the United States has frequently recognized the right of the settler to bargain for the surrender of the possession of public lands occupied by him, and the validity of contracts founded upon such a consideration has been repeatedly affirmed. In

**Catholic Bishop of Nesqually vs. Gibbon, 158 U. S. 155,**

the court, after remarking that the pioneer had always been regarded as entitled to favorable consideration, quoted as follows from

**Lamb vs. Davenport, 18 Wall. 307:**

“ ‘Of course, no legal title vested in any one by these proceedings, for that remained in the United States—all of which was well known and undisputed. But it was equally well known that these possessory rights, and improvements placed on the soil, were by the policy of the government generally protected, so far, at least, as to give priority of the right to purchase whenever the land was offered for sale, and where no special reason existed to the contrary. And though these rights or claims rested on no statute, or any positive promise, the general recognition of them in the end by the government, and its disposition to protect the meritorious actual settlers, who were the pioneers of emigration in the new territories, gave a decided and well understood value to these claims. They were the subjects of bargain and sale, and, as among the parties to such contracts, they were valid.’ ”

It is a fair assumption that the railroad grant acts were not so framed as that the grant would expand and take in lands subject to claims at the time of the filing of the map of definite location when, for any cause, the right of the occupying claimant should terminate, because such a provision would deny to him the opportunity to sell his holdings and practically operate to forfeit his improvements to the railroad company should he attempt to do so, or, unfortunately, die, before his claim was perfected.

The same considerations forbid the belief that in the act in question a rule of evidence was established that accomplishes the same result as an express provision so extending the grant.

Finally the inadmissibility of this arbitrary rule of evidence is apparent if we conceive of an action brought by the Northern Pacific Railway Company against Lemline, at any time between 1882 and 1889, to eject the latter from the premises.

It had the legal title to all non-mineral odd sections within the limits defined by the act and the map of route, not reserved or excepted. Certainly Lemline could have shown in that action that the tract in question was excepted and he could show the facts which brought it within the exception. The company would have been defeated because it would appear that it had no title to the land. But if it had no title in 1886, say, it had none at any later date.

Three reasons are assigned by the brief at pages 18 and 19 why the appellant should not recover, in addition to his alleged laches, canvassed later.

These are, 1. That Lemline was not a citizen of the United States; 2. That it is not shown that he, Lemline, was not the owner of more than 160 acres of land; and 3. That he abandoned the land in 1889 and sold his squatter rights.

1. The record scarcely justifies the statement that he was a native of Germany, but if he was, the proof of his citizenship from his voting and exercising the rights of citizenship is ample, on the authorities referred to in the original brief. The land office has uniformly regarded such evidence as competent and sufficient.

Jones vs. So. Pac. Ry. Co., 19 L. D. 270;

So. Pac. Ry. Co. vs. Brown, 9 L. D. 173;  
Wm. Heley, 6 L. D. 631.

2. Since the law denying to one the right to enter a homestead who is the owner of 160 acres of land was not passed until 1891, it can scarcely be regarded as important in the determination of the question as to whether the land in suit was in 1882 occupied by a bona fide homestead settler. In considering whether Lemline was then a qualified homesteader, it is immaterial how much land he owned.

A further complete and sufficient answer to this objection will appear hereafter.

3. The claim of abandonment in 1889 when he sold to Trodick has been considered above.

These objections show how the appellee Northern Pacific Railway Company persists in its view that it is the conditions which happened to exist in 1891, after the survey was made, and not the conditions prevailing in 1882, when the map of definite location was filed, that are controlling.

As a sort of make-weight idea, not of sufficient importance in the mind of counsel to entitle it to a heading, it is suggested, at page 20, that it is not shown that the appellant is not the owner of 160 acres of land.

This is the first time the circumstance appears to have been adverted to in the litigation. The record is silent on the subject. There is no question about the fact. The Commissioner rejected his application to enter for no such reason. The appellees made no answer that the appellant was not entitled to the land because he was already the owner of 160 acres of land, or because he was such at the time he applied to enter, or that his application was rightly rejected for that reason.

The record being altogether silent upon the subject, it becomes a question as to whether non-ownership of 160 acres of land must be pleaded and proved by appellant or whether the appellees must aver such a condition in order to defeat the action.

By well established rules of pleading it was not incumbent on the appellant to plead this negative.

Section 2289 of the Revised Statutes, as amended by the Act of 1891, reads as follows:

“Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one-quarter section, or a less quantity, of unappropriated public lands, to be located in a body in conformity to the legal subdivisions of the public lands; but no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory, shall acquire any right under the homestead law. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.”

It will be observed that the qualifications of a homesteader are set out in the earlier part of the section, and then a proviso is inserted denying to any one the right to enter a homestead who is the owner of more than 160 acres of land in any state or territory.

The question as to when one pleading rights under a statute must negative the existence of conditions expressed in a proviso under which the right can not be asserted has been often considered. It has usually

presented itself in connection with criminal statutes, but the principles are equally applicable in civil actions asserting rights founded on statutes.

United States vs. Cook, 17 Wall. 168,  
is a leading case.

In that case Mr. Justice Clifford, speaking for the court, says:

“Where the exception itself is incorporated in the general clause, as is supposed in the alternative rule there laid down, then it is correct to say, whether speaking of a statute or private contract, that unless the exception in the general clause is negatived in pleading the clause, no offense, or no cause of action, will appear in the indictment or declaration when compared with the statute or contract; but when the exception or proviso is in a subsequent substantive clause, the case contemplated in the enacting or general clause may be fully stated without negating the exception or proviso, as a *prima facie* case is stated, and it is for the party for whom matter of excuse is furnished by the statute or contract to bring it forward in his defense.

“Commentators and judges have sometimes been led into error by supposing that the words ‘enacting clause,’ as frequently employed, mean the section of the statute defining the offense, as contradistinguished from a subsequent section in the same statute, which is a misapprehension of the term, as the only real question in the case is, whether the exception is so incorporated with the substance of the clause defining the offense as to constitute a material part of the description of the acts, omission, or other ingredients which constitute the offense. Such an offense must be accurately and clearly described, and if the exception is so incorporated with



the clause describing the offense that it becomes in fact a part of the description, then it cannot be omitted in the pleading; but if it is not so incorporated with the clause defining the offense as to become a material part of the definition of the offense, then it is matter of defense and must be shown by the other party, though it be in the same section or even in the succeeding sentence. 2 Lead. Cr. Cas., 2d Ed., 12; Vavasour v. Ormrod, 9 Dowl. & Ryl., 599; Spiers v. Parker, 1 T. R., 141; Com. v. Bean, 14 Gray, 53; 1 Stark. Cr. Pl., 246.

“Few better guides upon the general subject can be found than the one given at a very early period, by Treby, Ch. J., in *Jones v. Axen*, 1 Ld. Raym., 120, in which he said, the difference is, that where an exception is incorporated in the body of the clause, he who pleads the clause ought also to plead the exception; but when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause and leave it to the adversary to show the proviso; which is substantially the same rule in both its branches as that given at a much more recent period in the case of *Steel v. Smith*, which received the unanimous concurrence of the judges of the court by which it was promulgated.”

The entire applicability of this language to the solution of the problem before us will be apparent when Section 2290, R. S. U. S., as amended by the act of 1891, is considered. The preceding section having defined the homestead right, this one sets out the contents of the affidavit which the applicant must file to assert the right.

He must make affidavit of his qualification to enter, reciting the facts as required by Section 2289, but not a word is said in the affidavit required, the substance of

which in detail is set out, about his not owning more than 160 acres of land in any state or territory.

The principles announced in *United States vs. Cook* were applied in a civil action in

*Miller vs. Shields*, 8 L. R. A. 406,  
in the opinion in which numerous cases are referred to showing the generality of its application.

The Court of Appeals of the State of New York was guided by the same rule of pleading in an action brought to recover of certain stockholders of a corporation a liability imposed upon them by statute.

The case of

*Rowell vs. Janvrin*, 151 N. Y. 60,  
is particularly pertinent because the exception or proviso came into the statute by amendment.

The works on pleading in civil cases announce the rule substantially as declared by the Supreme Court in the case of *U. S. vs. Cook*.

*Bliss on Code Pleading*, (3d Ed.) 202;

*Shipman's Common Law Pleading*, 229.

Many other conditions besides the appellant's land wealth, if he were so encumbered, would operate to deny to him the right to make a homestead entry. If he had ever made a filing before, he could not make a valid new one unless his right was restored.

In view of the provisions of Section 2290, he would not be entitled to the land if he had made any agreement to transfer it or if he intended it should be for the benefit of some one other than himself.

Under another provision of the statute—the Act of August 30, 1890—no single individual is entitled to enter more than three hundred and twenty acres of public land in the aggregate.

If the appellant had prior to the time he applied to enter the land in question and after 1890 acquired three hundred and twenty acres of public land under the desert land act, he could not make a valid homestead filing.

But it surely can not be maintained that he must negative in his bill the existence of all possible conditions under which, if existing, he would be denied a homestead entry. If such a state of facts existed, the appellees should have pleaded and proved it.

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But it is said that the appellant is guilty of such laches as ought to operate to deny him relief, both before and after he tendered his filing in 1896.

It has been shown, it is believed, that his rights were in no way prejudiced by any delay in tendering his filing, no intervening claim having accrued. As to delay after the Commissioner's ruling, it is enough to say that the present suit could not be maintained until after the patent issued. It was issued in January, 1903, and this suit was begun in March, 1904. The case of

*Bogan vs. Edinburgh L. & M. Co.*, 63 Fed. 192, is a complete answer to the claim of laches.

In that case it appeared that one Irwin filed on the land January 6, 1881, and made proof December 21, 1881. He was an alien when he filed, but declared his intention before making proof and received his final certificate. He then mortgaged the land to the Edinburgh Company. November 20, 1882, the Commissioner canceled his entry on the ground that it was void because of his alienage, at the time he filed. Then one Bogan entered the land as a homestead and it was patented to him September 17, 1890. In 1892 the Company foreclosed, bought in the property and in 1893 brought suit to

have the patentee declared trustee in its behalf, on the ground that the Commissioner erred as a matter of law in canceling Irwin's entry. The court held that his alienage at the time of his filing was of no consequence and that his right to the land was perfect when he declared his intention before making proof.

It was urged that the complainant was guilty of laches, but the Circuit Court of Appeals, speaking through Judge Sanborn, disposed of the contention, as follows:

"The doctrine of laches has no just application to this case. It is applied, by analogy, to the statute of limitations, to promote, not to defeat, justice. It was not until November 17, 1890, that the patent to this land was issued, and this suit could not have been maintained before that date. It was brought April 8, 1893. This ought not to be held to be a fatal delay, especially in view of the fact that the time limited by the statutes of North Dakota for the recovery of real property is 20 years. Comp. Laws Dak. 1887, Sec. 4837."

The obvious rule that a suit to have a *patentee* declared a trustee can not be maintained until the *patent* issues has been declared in many cases.

Until then the whole subject as to who should get the land is reposed for determination in the land department.

It may at the eleventh hour or at the last minute of the eleventh hour conclude that its former rulings were unsound and issue the patent to the party rightfully entitled to it. But in any event the court will not take from it the determination of the question as to which of the parties is entitled to the patent until its jurisdiction ceases by the issuance of the patent.

Forbes vs. Driscoll, 31 N. W. 633;

United States vs. Schurz, 102 U. S. 167;  
 Knight vs. Association, 142 U. S. 161;  
 Michigan L. & L. Co. vs. Rust, 168 U. S. 589;  
 Love vs. Flahive, 205 U. S. 195;  
 17 Ency. of Pl. & Pr., 128-129.

In connection with the claim of laches mention is made of the fact that no appeal was taken from the ruling of the Commissioner rejecting appellant's application to the Secretary. It is not claimed that this operates as a bar to recovery, but is mentioned as a fact that, with the other considerations adverted to, ought to impel the court to apply the doctrine of laches.

Of course an appeal to the Secretary is not an essential pre-requisite to the maintenance of the action. The action of the Commissioner unappealed from is the action of the Secretary. The latter performs his functions as to the disposition of the public lands through the Commissioner.

The rules give the right of appeal from the action of the Secretary through the Commissioner to the Secretary in person. But there is no obligation to appeal. There was no appeal in the Bogan case.

Cunningham vs. Ashby, 14 How. 377;  
 Garland vs. Wynn, 20 How. 6;  
 State of Arkansas vs. Lytle, 22 How. 193; and  
 Lindsey vs. Hawes, 2 Black. 554,

were all cases in which the land office ruling complained of was made by some officer inferior in rank to the Secretary.

Besides it would have been idle to appeal to the Secretary, as he gave to the Colburn case the same force and effect as did the Commissioner.

N. P. R. R. Co. vs. Allen, 27 L. D. 286;

Central Pacific R. R. Co. vs. Hunsaker, 27 L. D.  
297.

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The argument made in the brief, that "if the rule for which counsel contend is correct, there is not a patent ever issued to the Northern Pacific Railroad Company that may not be overthrown on a mere oral showing that on the date when the map of definite location was filed, A. or B. was in possession of the land covered by the patent, 'intending to enter it as a homestead,' and that he died next day," (Brief of Appellee, pages 15 and 16) is very much narrowed in the oral presentation of the case.

In the first place all tracts are cut out which were surveyed before the filing of the map of definite location. It was recognized that counsel for appellant did not and could not contend that patents for such tracts were void if there was no land office record at the time of filing the map of definite location.

Next, that even if there were a land office record, under the decisions in Tarpey vs. Madsen and N. P. vs. De Lacey, and the time had expired when, under the statute, the next succeeding step in the land office must be taken, before the map of definite location was filed, the patent was unassailable.

Third, that the patent is valid in an action at law, even though it should appear beyond question that the land was occupied by a bona fide homestead settler at the time of the filing of the map of definite location.

The determination of the question as to whether it was so occupied or was not so occupied is reposed by the law in the land department and its determination is binding except in cases of fraud or where the matters of

law.

It has been expressly held that, notwithstanding the decision in the *Dunmeyer* case and in *Whitney vs. Taylor* and many others, a patent to a railroad company for land which the facts showed were excepted from the grant *is not void*, will sustain the title of the railroad company in an action at law, and enable it to transfer good title to a bona fide purchaser. The decision in

United States vs. Winona & St. P. R. Co., 67 Fed.  
948,

by the Circuit Court of Appeals for the Eighth Circuit, is to this effect.

Finally the patent is unimpeachable even in equity, except at the suit of some one to whom the patent ought to have been issued instead of to the railroad company. If, at the time of its issuance, there is no one who has then placed himself in a position to demand the patent, no private individual can be heard even in an equity suit to say that it is void.

In the oral argument counsel for the appellees recognized that counsel for appellant took no such position as the brief asserts and made no contention from which the conclusions therein said to follow would ensue.

The only danger the railroad company is in after it gets the patent is such as flows from a suit in equity by one whose right to the land had become fixed before the patent was issued and to whom it ought to have gone. Certainly it ought not to complain of such a risk. Every other patentee of the government takes the same risk. Why should the courts be closed to one asserting such a right against the Northern Pacific Railway Company? Why make any distinction as to it? Why should it be permitted to keep what was given to it by mistake and

what under the law belongs to another?

If it has not yet obtained a patent for the land, what rule more just than that the land department, before it issues it, should inquire, hear and determine on oral evidence or any relevant evidence whether the land was or was not "free from pre-emption or other claims or rights," or whether it was or was not occupied by homestead settlers at the time of the filing of the map of definite location?

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In the statement of the position of counsel for appellant above, the brief of appellees assumes, for the purpose of exhibiting the supposed weakness of the position attacked, that the proof showed (presumably before the land office on the application for the patent or in such action as this) the occupancy of the tract by a *bona fide* homestead settler *who died the next day* after the map of route was filed. In the oral argument the case was put of the occupant abandoning the land the day after. Let us assume, on the other hand, that after continuing his residence on the land, improving it yearly by his labor from July 6, 1882, to the day before the plats of the survey were filed in 1891, he died on that day. Of course the right of the railroad company to the land is just exactly the same as though he died at any intervening time, say near the middle of the period, or as did Lemline in 1889.

If a man did abandon the land on the 7th day of July, 1882, that fact would be a most persuasive circumstance leading to the conclusion that he had no purpose on the 6th to enter the land as a homestead. But if we assume the case of indubitable proof that he was on the 6th occupying the land in good faith, intending to enter the



land when surveyed, the fact that he abandoned it on the 7th would be unimportant. And certainly it would be unimportant that he died on the 7th.

The appellee Northern Pacific Railway Company has no right to this land and it ought not to be permitted to withhold from the aged appellant, to whom under the law and in justice it belongs.

WALSH & NOLAN,  
Solicitors for Appellant.

T. J. WALSH,  
Counsel for Appellant.



164 Fed. 913.

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

No. 1563.

JOHN TRODICK,

Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,  
a Corporation, and ALBION McDONALD  
and AGNES AUCHARD, as Administratrix with  
the Will Annexed of David Auchard, Deceased,  
Appellees.

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## SUPPLEMENTAL BRIEF OF NORTHERN PACIFIC RAILWAY COMPANY.

When advised of the setting of this cause for argument the writer hereof, who represented the Railway Company on the argument in the court below, realizing that it would not be possible to prepare, print and forward to San Francisco a direct answer to whatever brief should be prepared on behalf of appellant within seven days after that brief should be served on associate counsel in Helena and forwarded to St. Paul, thought it necessary to print and forward the

brief on behalf of appellees in advance and in anticipation of the receipt of appellant's brief. Accordingly the brief submitted to Judge Hunt in the court below was printed word for word as it was filed there, excepting only such verbal changes as were occasioned by the fact that it was addressed to a different court, and forwarded to San Francisco for filing. It would have been more satisfactory, of course, if we could have seen appellant's brief before preparing ours; but the brief submitted below sufficiently stated the substantive propositions on which we relied and we were content to rest upon it.

On the argument of the cause at San Francisco, counsel for appellant announced a purpose of filing a brief in reply to ours. The occasion for his doing so was not apparent because, as stated, our brief was the same brief that had been filed below; it had been thoroughly examined by him; and his own original brief, as the court will see on examination, is throughout devoted to a refutation of the argument advanced in it. But we could see no reason to oppose his making any further *reply* he thought it necessary to make, and so we made no objection to the giving of that permission which the silence of the court on hearing his suggestion presumably accorded to him.

The so called "reply brief of appellant" has just been received. That it is not a *reply* brief in any true sense is apparent upon the slightest inspection of it.

## 3

From beginning to end it is devoted to a reargument and a re-enforcement by the citation of new authorities of the propositions advanced in his original brief, to restating and amplifying the points made by him on the oral argument, and to analyzing and combating the oral argument made on behalf of appellees. It would argue indifference to the decision which this court shall render if we were to submit in silence to what we conceive to be a plain attempt, under the guise of a reply brief, to reargue and fortify his case. We therefore take this occasion to make our own position clear, and incidentally to answer the new arguments now advanced by him.

1. We have insisted (Appellees' Brief, pp. 19-20) that appellant's failure to show that he was not the owner of 160 acres of land was fatal to his case. Referring to this, counsel in his reply brief says (page 10):

"As a sort of make-weight idea, not of sufficient importance in the mind of counsel to entitle it to a heading, it is suggested, at page 20, that it is not shown that the appellant is not the owner of 160 acres of land.

*"This is the first time the circumstance appears to have been adverted to in the litigation. The record is silent on the subject. There is no question about the fact. The Commissioner rejected his application to enter for no such reason. The appellees made no answer that the appellant was not entitled to the land because he was already the owner of 160 acres of land, or because he was such at the time he applied to enter, or that his application was rightly rejected for that reason."*

The criticism as to the *manner* in which the point is made by us may be dismissed without comment. We are content that the court should judge, from what we have said on pages 19 and 20 of our original brief, of the sincerity and earnestness with which the point is made. But counsel proceeds to assert that "*this is the first time the circumstance appears to have been adverted to in the litigation.*" The assertion is untrue. As said above, our brief in this court is identical with our brief in the court below; and all that we have said in it upon the point in question was said *word for word* in the brief submitted to Judge Hunt in the court below. The same point was fully developed upon the oral argument before Judge Hunt. It is difficult to understand how counsel can be unaware of this fact, for, as already stated, he had read our brief in the court below before he prepared his own, and the only excuse for this gross error of fact is that it is due to the same kind of oversight which prompted him on the oral argument of the case to deny that the point *had been made at all* until his attention was directly called to it.

Counsel says that there is no question about the *fact* of appellant's ownership or non-ownership of 160 acres of land. There is the same question that always exists concerning a fact which a party must prove in order to prevail and which he utterly fails to prove. His omission to prove it was pointedly called to his

attention in the court below at a time when had evidence been adducible to establish the fact it is probable that the court would have allowed him to open his case and prove it. No such proof was offered and it must therefore be assumed that it was impossible to adduce it. But whether possible or not it is certain that the evidence was not offered, and under well established principles of law the omission to prove it is fatal to his case.

It is quite unnecessary to follow counsel through his labored argument drawn from an assumed analogy with criminal statutes as to what it is necessary to plead in cases of this character, because the decisions of the Supreme Court are too plain. As stated in *Sparks v. Pierce*, cited in our original brief, "it must affirmatively appear that the claimant is entitled" to the land before he can prevail in an action of this kind. Waiving all question as to the pleading, the failure to make it appear by the *evidence* is enough to defeat the claim. This court has so frequently followed the cases cited upon this point that further argument upon it can hardly be necessary.

*Savage v. Worsham*, 66 Fed. Rep. 852;

*California Red Wood Co. v. Little*, 79 Fed. Rep.  
854;

*American Mortg. Co. v. Hopper et al.*, 64 Fed.  
Rep. 553.

It is said the Commissioner did not reject appellant's application upon this ground. Certainly not because the Commissioner never got that far. The grounds upon which his rejection was based were deemed by him sufficient.

It is said that Section 2290 R. S. U. S. sets out the contents of the affidavit which the homestead applicant must file; and that not a word is said in the affidavit required by that section about the applicant's not owning more than 160 acres of land. But Section 2290 does not profess to set out in detail *all* that the affidavit of the homestead applicant must contain. Nothing is said in Section 2290 about the applicant being a citizen of the United States or having declared his intention to become such. Would counsel contend that an applicant could enter land as a homestead without making it appear by his affidavit that he was a citizen of the United States? Argument of this question is foreclosed by the rulings of the Land Department. We append to this brief a copy of the form of affidavit which, by the rules of the Commissioner of the General Land Office as contained in the circular of January 25, 1904, page 275, the applicant is required to make; and it will be observed that at the very head and front of this affidavit there must appear the statement that the applicant is not the proprietor of more than 160 acres of land in any state or territory.



In an action of this kind the complainant must show to the court, in order by virtue of his rights under the homestead law to get the title from an individual in whom it stands, precisely what he must show to the Government in order to get the title from the Government by virtue of his rights under that law. He is a suitor in a court of equity. He is asking for equitable relief. Principles as old as equity jurisprudence require that he shall fully and fairly state his case and prove it. One who neglects or fails to show non-ownership of 160 acres of land is certainly not entitled under the homestead law to patent from the Government; and by no process of *legerdemain* can his rights be increased or the establishment of them facilitated merely because he is asserting them in a court instead of before the Land Department.

The absurdity of relieving him from the burden of supplying this affirmative proof is well illustrated by the suggestion contained in counsel's reply brief, page 15, as to how the fact *should* be developed and established. "If such a state of facts existed," he says, "*the appellees should have pleaded and proved it.*" How can the appellees possibly know anything about it? Must the Railway Company, whenever it is brought into a court of equity to defend the title which the Government has given to it against one claiming to be equitably entitled to it, conduct an independent investigation to ascertain whether the complainant

really possesses the qualifications to enter the land? To ask such a question is to answer it. The facts are in the possession of the complainant and as stated by this court in *American Mortg. Co. v. Hopper, supra*, the *burden* is upon him to establish them.

It is said that conditions other than non-ownership of 160 acres of land would operate to deny to complainant the right to make a homestead entry. Very true; and if appellant has not shown that these conditions have been fully met, it is certain that his failure to do so defeats his right to recover in this suit. No stress has been laid upon the other conditions because of evidence which leaves the question debatable as to whether or not he has actually met them; but that he has not shown non-ownership of 160 acres of land is indisputable. Moreover, the affirmative evidence which the record contains (pp. 166-169, 173) of the use by appellant of the premises in question for saloon and other business purposes is probably of itself sufficient to destroy any homestead rights he might otherwise possess.

6 *Land Decisions*, 332;

10 *Land Decisions*, 649.

2. Counsel cites the case of *Northern Pacific Ry. Co. v. McCormick*, 94 Fed. Rep. 932, as supporting his contention that occupancy in good faith may be shown by oral testimony whether entry in the Land Office has been made by the occupant within the pre-

scribed period of three months or not. But the decision in the McCormick case is in strict accord with the construction which as we contend the decision in the Nelson case must bear. In the McCormick case, as in the Nelson case, the person who was in possession of the unsurveyed land when the map of definite location was filed made his entry *within the time prescribed by law* after the completion of the survey. This point is brought out by Judge Morrow in the decision where in distinguishing the Colburn case he says, "The facts in that case did not require the court to determine the effect of a settlement upon public land by a qualified settler, followed by a pre-emption entry *within the time prescribed by law*."

3. The grant of July 2, 1864, was a grant *in praesenti*. Upon the identification by survey of the sections granted and the filing of the map of definite location the legal title vested in the Railway Company. Patents, though instruments of further assurance, are not necessary to the completeness of that title, and an action of ejectment could be maintained by the Railway Company though no patent had been issued. *Deseret Salt Co. v. Tarpey*, 142 U. S. 251. The lands were granted in aid of the railroad enterprise and it was contemplated that the Railway Company should be able to use the proceeds derived from their sale long before the actual issuance of patents by the Land Department. As stated by the Supreme Court of the

United States in *Tarpey v. Madsen*, 178 U. S. 227:

"Surely Congress in making a grant to a railroad company intended that it should be of present force, and of force with reasonable certainty. It meant a substantial present donation of something *which the railroad company could at once use*, and use with knowledge of that which it had received. It cannot be supposed that Congress contemplated that, as in this case, a score of years after the line of definite location had been fixed and made a matter of record, some one should take possession of a tract apparently granted, and defeat the company's record title by *oral testimony*, that at the time of the filing of the map of definite location there was an actual though departed occupant of the tract, and therefore that the title to it never passed."

When the case of *Barden v. Northern Pacific Ry. Co.*, 154 U. S. 288, came before the Supreme Court in 1894, it was recognized that the principles there laid down would create a doubt as to the validity of the Railway Company's title until such time as a patent amounting to an adjudication that the land was non-mineral should issue; and in consequence of that decision and of the intimation contained in it that legislation should be enacted providing for a definite ascertainment of the character of the lands within the grant, the act of Congress of February 26, 1895 (28 Statutes at Large, p. 682), was enacted. That act provided for the examination and classification of these lands for the very purpose of removing whatever doubt should exist previous to the issuance of patent as to where the title lay and to enable the railroad

## II

company to convey a perfectly valid title to lands classified as non-mineral even though patent should not as yet have issued to it.

The principle laid down in the Barden case was applied to the question whether lands were excepted from the grant by reason of their *physical character*. That question could be resolved by actual examination of the lands; and could be resolved as well at one time as at another. But when, two years later, in the case of *Northern Pacific Ry. Co. v. Colburn*, 164 U. S. 383, the question arose whether lands were excepted from the grant *because of their occupancy by bona fide settlers* there was no thought on the part of the Supreme Court of applying for the determination of *this* question the principle which it had laid down for the determination of the question of the physical character of the lands. Had the principle for which counsel is here contending appealed to it, it certainly would have been laid down. The Barden case had been decided only two years before. Yet by its unanimous decision the court in the Colburn case adhered to the principle which it had so many times previously announced that the good faith of the homesteader or other occupant must be attested of record in order to except the land from grant.

And this principle has never been departed from. The Nelson case and the decision of this court in *Railway Co. v. McCormick*, *supra*, are in strict accord

with it. Both hold that the occupancy *in good faith* of unsurveyed land within an odd numbered section at the time of filing of the map of definite location will except such occupied land from the grant; but certainly nothing is said in either of them to indicate that the court has departed from the principle that this *good faith* must be attested by an entry within the time required by law.

Every decision cited by counsel for appellant either in his original brief or in his reply brief is a case in which the good faith of the claimant was so attested.

Nor is it in the slightest degree inconsistent or illogical, nor does it work any hardship on the occupant to apply this rule. It certainly is no hardship to hold the occupant to that same diligence which he must exercise as against other claimants, and it certainly is no more illogical to say that the time when the railroad company shall definitely know what lands belong to it shall be fixed at ninety days from the date of filing of the plat of survey than it is to say that this time shall be fixed as the date of the issuance of the patent. On counsel's own contention where lands were unsurveyed when the map of definite location was filed the question what lands actually passed to the Railroad Company must remain suspended until it shall have been resolved by the issuance of a patent; and it is no more illogical to say that this question shall be resolved at one time and in one way than it is to

say that it shall be resolved at a later time and in a different way; and the purposes underlying the grant require that the question shall be *promptly* resolved.

It is said that if the Railway Company at any time between the filing of the map of definite location and the death of Lammlein sought to eject him it must have failed in the action. It is a sufficient answer to this argument to say that while the land was unsurveyed it would have been impossible for the Railway Company to maintain ejectment or any other action at law. *Northern Pacific Ry. Co. v. Hussey*, 61 Pac. 235; *United States v. Montana Lbr. Co.*, 196 U. S. 573. While the lands were unsurveyed and until the odd numbered sections were defined they were within the jurisdiction of the Land Department; *Humbird v. Avery*, 195 U. S. 480; and though in accordance with the decision of this court in *Northern Pacific Ry. Co. v. Hussey*, *supra*, the Railway Company could maintain an *equitable* action to enjoin waste the courts would be powerless to say in an action at law who was entitled to possession of them.

It is said that the principles contended for by us would result in defeating the right of every *bona fide* homestead settler who was in actual possession of unsurveyed lands when the map of definite location was filed and who died before the completion of the survey. But this is not so. Under Section 2291 R. S. U. S. the widow or heirs of such a settler could, of

course, prove up within the same time after the completion of the survey that the law gives to the settler himself. And so if—to take the case supposed by counsel on page 20 of his reply brief—Lammlein had continued to occupy the premises until the day before the plats were filed in 1891 and had then died, his widow or his heirs would, of course, have had an undoubted right to prove up the claim for a period of ninety days thereafter. But if previous to his death he had bargained away such possessory rights as he had in it, it is surely unjust and unreasonable to hold that the land is excepted from the grant by reason of its occupation in good faith with an intention to enter *when survey should have been completed*, in the face of evidence absolutely disqualifying the occupant as an entryman and conclusively negating any intention to enter. 34 *Land Decisions*, 46.

Respectfully submitted,

WM. WALLACE, JR.,

CHARLES DONNELLY,

Solicitors for Northern Pacific Railway Co.

#### APPENDIX.

(4-063)

#### HOMESTEAD AFFIDAVIT.

U. S. Land Office at.....,  
....., 19.....

I, ....., of .....,  
having filed my application, No....., for an  
entry under Section 2289, Revised Statutes of the



United States, do solemnly swear *that I am not the proprietor of more than one hundred and sixty acres of land in any State or Territory*; that I am (b) .....; that my application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation, and that I will faithfully and honestly endeavor to comply with all requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that I am not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation or syndicate whatsoever, by which the title which I might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except myself; and further, that since August 30, 1890, I have not acquired title to, nor am I now claiming under any of the agricultural public land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate three hundred and twenty acres, except..... and that I have not heretofore made any entry under the homestead laws except.....  
(Sign plainly with full Christian name.)

.....  
Sworn to and subscribed before me this.....  
day of....., 19....., at my office at  
....., in.....County,  
.....

(b) Here insert statement that affiant is a citizen of the United States, or that he has filed his declaration of intention to become such, and that he is the head of a family, or is over twenty-one years of age, as the case may be. It should be stated whether applicant is *native born* or not, and if not, a certified

copy of his certificate of naturalization, or declaration of intention, as the case may be, must be furnished. (See circular of Land Department of January 25, 1904.)

221 U. S. 208

# Supreme Court of the United States

OCTOBER TERM, 1910.

No. 117.

NORTHERN PACIFIC RAILWAY COMPANY,  
ALBION McDONALD and AGNES AUCHARD,  
as Administratrix with the Will Annexed of  
DAVID AUCHARD, Deceased,

*Appellants,*

v.

JOHN TRODICK,

*Appellee.*

## STATEMENT OF FACTS.

This is an appeal from a decree of the Circuit Court of Appeals for the Ninth Circuit in a suit in equity brought by the appellee in the Circuit Court of the United States for the District of Montana. In that suit appellee sought to have it decreed that he was rightfully entitled, under the homestead laws, to the southeast quarter of section thirty-five, township fifteen north, range four west, in the state of Montana, and that the patent title given by the government to the Northern Pacific Railway Company and by that company transferred to its co-defendants, should be held in trust for him. The Circuit Court, Judge Hunt sit-

ting, denied the relief sought and dismissed the bill. The Court of Appeals, in an opinion written by Judge Ross and concurred in by Judge Gilbert, reversed the decree of the Circuit Court, Judge Morrow dissenting. From the decree of reversal, this appeal is taken.

There is no dispute as to the facts and they are as follows :

July 7, 1864, the Northern Pacific Railroad Company was incorporated by act of Congress (13 Stat. at L. 365). The third section of that act (omitting immaterial clauses at the end thereof) reads as follows :

“That there be, and hereby is, granted to the ‘Northern Pacific Railroad Company,’ its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, *and* whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office; and whenever, prior to said time [of definite location], any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of

the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

Compliance with certain conditions was by other sections of the act made necessary to the enjoyment of the above grant; but it appears affirmatively from the bill of complaint that these conditions were complied with.

July 6, 1882, the railroad company filed with the Commissioner of the General Land Office its map of definite location of its line of railway coterminous with and less than forty miles from the land here in controversy. All parties concede that this land is not mineral and that when the map of definite location was filed the United States had "full title" to it. At that time one Martin Lammlein was living upon it and he continued to live there until his death, which occurred in August, 1889 (Tr. p. 531), not in 1891, as the Court of Appeals erroneously states (Tr. pp. 554, 558). During all of this time the land was unsurveyed. Before Lammlein's death, appellee purchased or agreed to purchase from him the improvements upon the land, and has since resided upon it.

The land was surveyed in 1891 and the township plat of survey embracing it was filed in the local land office August 10, 1891. No attempt was made by anyone to enter it until January 10, 1896, when appellee applied to make a homestead entry. His application was refused upon the ground that the land belonged to the railroad company under its grant. He appealed to the Commissioner of the General Land Office who affirmed the action of the local officers May

26, 1896, without prejudice, however, to appellee's right to apply for a rehearing to determine the status of the land July 6, 1882. He applied for a rehearing August 10, 1896. A rehearing was had and upon the testimony adduced the Commissioner of the General Land Office, on December 24, 1898, decided that the land belonged to the railroad company. November 30, 1896, the railroad company contracted to sell the land to David Auchard and on March 3, 1899, it conveyed it to him by warranty deed. (Tr. p. 33.) January 10, 1903, patent was issued to the defendant Northern Pacific Railway Company as successor to the Northern Pacific Railroad Company.

### SPECIFICATION OF ERRORS.

#### I.

The court erred in holding that Lammlein's occupation, unaccompanied by any entry, either during his lifetime or within ninety days after the filing of the plat of survey, operated to except the land from the grant.

#### II.

The court erred in not holding that Lammlein's sale of his rights established conclusively that his occupancy was not *bona fide*.

#### III.

The court erred in holding that appellee was entitled to the land.

#### IV.

The court erred in not affirming the decree dismissing the bill.

## ARGUMENT.

## I.

The question upon which the case was decided, both in the Circuit Court and in the Court of Appeals turns on the decision of this Court in *Nelson v. Northern Pacific Railway Company*, 188 U. S. 108. That case, like the case at bar, dealt with lands lying within the primary limits of the grant to the Northern Pacific Railroad Company; and in that case, as in the case at bar, the land involved was *unsurveyed* when the map of definite location was filed. The plaintiff Nelson occupied it at that time; *but as soon as the land was surveyed* (and we ask the court to note the stress which, throughout the opinion, Mr. Justice Harlan places upon this fact), Nelson *at once* attempted to enter it. The act of May 14, 1880, cited and relied on by Mr. Justice Harlan in the opinion, gives the homesteader ninety days after the completion of the survey in which to make his entry, and *within this period* Nelson entered, or applied to enter the land in question.

This is the vital distinction between the Nelson case and the case at bar. In the Nelson case there was *of record* in the land office, within the period allowed to all homestead settlers in which to make their entries, an application to enter the land in question, and the good faith of the occupant of the land had been attested *of record*. In the case at bar no entry whatsoever was made by Lammlein, and his occupancy, which is relied on to except the land from the grant, had by his own act in selling to appellee been affirmatively shown to be without intention to enter under the homestead law.

Previous to the decision in the Nelson case, it had been held in *Northern Pacific Railroad Company v. Colburn*, 164 U. S. 383, that occupancy of an odd-numbered section of land within the place limits of a railroad grant, did not except it from the grant unless the occupant had manifested his good faith by an entry in the local land office. In his dissenting opinion in the Nelson case, Mr. Justice Brewer insists that the rule thus laid down was meant to apply to all cases of occupancy whether of surveyed or unsurveyed land; but Mr. Justice Harlan writing the opinion of the majority distinguishes the Colburn case from the Nelson case by pointing out that in the Colburn case the land was surveyed and the occupant could have entered it, and his failure to enter it was conclusive evidence of a lack of good faith; whereas, in the Nelson case, the land was unsurveyed at the time of filing the map of definite location, and therefore the occupant could not enter it at that time. But the point is (and, as said above, Mr. Justice Harlan himself lays special stress upon and italicizes the fact), that Nelson did seek to enter the land *promptly on the completion of the survey*, and thus got his claim of record within the time allowed by the act of May 14, 1880 for doing so.

Counsel for appellee contends, however, and the Court of Appeals has held, that the circumstance thus adverted to as distinguishing the Nelson case was but an incident of that case and not at all vital to it; that as to lands unsurveyed when map of definite location is filed, the state of the record then or at any subsequent time is utterly beside the question; that if at the time of definite location, there is present upon the land a qualified settler intending to enter it when surveyed,



the land is *ipso facto* taken out of the grant; and that even though the settler may abandon it the day after definite location, even though he may (as in the case at bar he did) actually disqualify himself to enter it by selling his rights in it in violation of a statute forbidding that very thing (Sec. 2290, R. S. as amended by act of March 3, 1891, 26 Statutes at Large, 1095) the fact that he had settled upon it and the fact that he intended to enter it may be established by oral evidence, by anyone, at any time before the issuance of patent to the railroad company.

To sustain this contention the court must disregard the purpose for which the act of 1864 was passed and a long line of decisions in which it has been construed. The grant to the Northern Pacific Railroad Company, like all other Pacific Railroad grants, was made in aid of the railroad enterprise; and it was contemplated that the company should be able to sell the lands granted and to use the proceeds from their sale long before the actual issuance of patents. Accordingly it was held at an early date that the grant was *in praesenti*; that upon filing map of definite location title attached as of the date of the grant to the specific lands granted within the place limits; that patents, though instruments of further assurance, were not necessary to the completeness of that title; and that ejectment could be maintained by the railroad company, if the lands had been identified by survey, even though no patent had issued.

*St. Paul & Pac. R. R. Co. v. N. P. Ry. Co.*, 139 U. S. 5.

*Deseret Salt Co. v. Tarpey*, 142 U. S. 251.

*Northern Pacific Ry. Co. v. Colburn*, 164 U. S. 387.

As was said by this court in *Tarpey v. Madsen*, 178 U. S. 227,

“Congress in making a grant to a railroad company intended that it should be *of present force, and of force with reasonable certainty*. It meant a substantial present donation of something which the railroad company *could at once use*, and use with knowledge of that which it had received.”

Such being the purpose of the grant, it was important to know in advance of the issuance of patents (for these might be delayed, and in fact have been delayed many years) exactly which of the odd numbered sections came under the grant and which of them were excepted from it; and this court early laid down the rule, from which it has never swerved, that the question whether an odd numbered section within primary limits had passed to the railroad company or had been excepted from the grant by reason of a homestead or other claim upon it must be determined *by the records of the Land Department* and that only by an entry of record in that department could the good faith of the claimants be manifested.

Thus in *Lansdale v. Daniels*, 100 U. S. 113, 116, it was said that “such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a pre-emptor, the rule being that his settlement alone is not sufficient for that purpose.”

In *Kansas Pacific R. R. Co. v. Dunmeyer*, 113 U. S. 629, 644, the court, speaking of the kind of occupancy necessary to except land from a railroad grant, said:

“Of all the words in the English language, this word *attached* was probably the best that could

have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation."

In *Whitney v. Taylor*, 158 U. S. 85, 94, the court said:

"But it is also true that settlement alone without a declaratory statement creates no preemption right. 'Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a preemptor, the rule being that his settlement alone is not sufficient for that purpose.' *Lansdale v. Daniels*, 100 U. S. 113, 116. And the acceptance of such declaratory statement and noting the same on the books of the local land office is the official recognition of the preemption claim."

In *Northern Pacific R. R. Co. v. Colburn*, 164 U. S. 383, 386, the court said:

"If it be true, as matter of law, that mere occupation or cultivation of the premises at the time of the filing of the map of definite location, unaccompanied by any filing of a claim in the land office then or thereafter, excludes the tract from the operation of the land grant, the decision of the Supreme Court of Montana was right. But frequent decisions of this court have been to the effect that no preemption or homestead claim attaches to a tract until an entry in the local land office."

In *Tarpey v. Madsen*, 178 U. S. 216, the holding of the court is expressed in the following paragraph from the syllabus:

"A proper interpretation of the acts of Congress making railroad grants like the one in this case requires that the relative rights of the company and an individual entryman must be determined, not by the act of the company, in itself fixing definitely the line of its road, or by the mere occupancy of the individual, but by record evidence, on the one part the filing of the map in the office of the Secretary of the Interior, and, on the other, the declaration or entry in the local land office."

And in *United States v. C. M. & St. P. Ry. Co.*, decided at this term, the court, dealing with a grant similar to this, where it was stipulated that "none of the lands described in the bill of complaint had been covered by any homestead entry, pre-emption, declaratory statement or warrant location or other existing claims of record in the office of the Commissioner of the General Land Office," said:

"If this were the whole case, then, beyond all question, the law would be in favor of the railway company; for the grant of 1864 was one *in praesenti* for the purposes therein mentioned, and according to the settled doctrines of this court, the beneficiary of the grant was entitled to the lands granted in place limits which had not been appropriated or reserved by the United States for any purpose or to which a homestead or pre-emption right had not attached *prior to the definite location of the road* proposed to be aided."

The act of May 14, 1880 (21 Statutes at L. 141) did not change the rule which these cases lay down. Indeed most of them were decided after that law became effective. That act simply gave to the homesteader the same period of grace previously enjoyed by the preemptor within which to make his entry;

and indisputably if such an entry had been made by Lammlein or by his heirs within three months after the plat of survey was filed, the railroad company would have lost its right to the land. But when that period had expired, the land was in the same category with every other odd numbered section within primary limits to which no right had been asserted of record within the time allowed by law. It belonged to the railroad company and assuredly that company was not obliged to wait twelve years until patent should be issued before it could convey a good title to it.

The case of *Water & Mining Company v. Bugbey*, 96 U. S. 165, is exactly in point. That case involved a controversy between a settler on the one hand and a water and mining company on the other over title to a tract of land in California. In 1851, the company, apparently without authority of law, commenced the construction of a canal upon the unoccupied and unsurveyed public lands of the United States within that state for the purpose of supplying water to miners. The canal was completed at large expense in April, 1853, and it covered the premises in controversy. By the act of March 3, 1853 (10 Statutes at L. 244) Congress granted sections 16 and 36 to the State of California for school purposes, the act providing "that where *any settlement* by the erection of a dwelling house or the cultivation of any portion of the land shall be made on the sixteenth and thirty-sixth sections *before the same shall be surveyed*, other land shall be selected by the proper authorities of the state in lieu thereof." The land in question was a part of section 16. It was surveyed in May, 1866, and the plats were filed June 16, 1866. At that time Bugbey was an actual settler

upon it and had thereon a dwelling house and agricultural and other improvements. *But he filed no claim to it within the time allowed by the preemption or homestead laws.* On the contrary, he dealt with it as being the property of the state and on April 22, 1867, purchased it from the state. On July 26, 1866, Congress passed an act recognizing the rights and confirming the title of those who had completed canals across public lands for mining purposes. The mining company was within the provisions of this act and its rights were superior to those of Bugbey, the settler, if at the time of its passage the United States had title to the lands. Bugbey asserted that at that time title had passed to the State of California, and that therefore Congress was powerless to grant or to confirm the mining company's rights in it; the mining company asserted that title had not passed to the states because at the time of survey there was a "settlement" upon it; and this was the one question in the case.

The court will observe how exact is the parallel here with the case at bar. From the grant to the state of California there were excepted lands upon which there was "any settlement," just as from the grant to the Northern Pacific Railroad Company there were excepted lands "occupied by homestead settlers." And if the mere physical presence upon the land of the "settlement" in the one case or of the "homestead settler" in the other, as facts to be established by oral testimony, had been all that was required to give rise to the exception and take the land out of the grant, the mining company must have prevailed, because there was indisputably a settlement upon the land when the survey was completed. But the settler in that case, as

Lammlein in this case, *made no entry within the time allowed by law for doing so*; and having failed to do so, he is said by the court to have abandoned it—just as Lammlein in a more emphatic way abandoned his claim when he sold whatever rights he had in it to the appellee. And the court held that because the settler failed to assert his claim to it, the title passed to the state, saying:

“As against all the world, except the pre-emption settler, the title of the United States passed to the State upon the completion of the surveys; and if the settler failed to assert his claim, or to make it good, the rights of the State *became absolute*. \* \* \* The settler, however, was under no obligation to assert his claim, and he having abandoned it, the title of the State *became absolute as of May 19, 1866, when the surveys were completed*. The case stands, therefore, as if at that date the United States had parted with all interest in and control over the property. As the act of July 26 was not passed until after that time, it follows that it could not operate upon this land in favor of the company.”

It is not possible to distinguish these two cases. The question whether title passed to the State of California in the Bugbey case depended upon the condition of the land at date of survey, just as in this case the question whether the land passed to the railroad company depended upon its condition at date of definite location. If there was a settlement upon the land at date of survey, the land was excepted from the grant to California. If there was a homestead settler upon the land at definite location, the land was excepted from the grant to the railroad company. As

a matter of actual, physical fact there was a settlement upon the land in the Bugbey case at date of survey, and as a matter of actual, physical fact there was a settler upon the land involved in this case at date of definite location. But because of the failure of the settler in the Bugbey case to follow up his settlement by entry in the land office within the time required by law, it was held that the title *became absolute* in the state as of date of survey and that Congress lost all control over it. Clearly by the same reasoning upon failure to make entry in the present case the title of the railroad company became absolute.

The case of *Burton v. Traver*, 130 U. S. 232, is likewise in point. In that case it appeared that certain lands in California had been occupied by one Oscar Traver from 1870 until his death in 1877. *During all this time these lands were unsurveyed.* Thereafter they were surveyed and the township plat was filed July 1, 1879; and Hattie L. Traver, the widow of the occupant, made preemption declaratory statement in her own right and obtained patent to the lands. The suit was brought by two daughters of the patentee, who alleged that they, with the patentee, were the only heirs of Oscar Traver, the original occupant, and that under Section 2269 of the Revised Statutes the patent obtained by the widow accrued to the benefit of the heirs. But the court, speaking unanimously through Mr. Justice Field, said:

“A settlement upon the public lands in advance of the public surveys is allowed to parties who in good faith intend, when the surveys are made and returned to the local land office, to apply for their purchase. If, *within a specified time after*



*the surveys, and the return of the township plat,* the settler takes certain steps, that is, files a declaratory statement, such as is required when the surveys have preceded settlement, and performs certain other acts prescribed by law, he acquires for the first time a right of preemption to the land, that is, a right to purchase it in preference to others. Until then he has no estate in the land which he can devise by will, or which, in case of his death, will pass to his heirs at law. He has been permitted by the government to occupy a certain portion of the public lands and therefore is not a trespasser, on his statement that when the property is open to sale he intends to take the steps prescribed by law to purchase it; in which case he is to have the preference over others in purchasing, that is, the right to preempt it. The United States make no promise to sell him the land, nor do they enter into any contract with him upon the subject. They simply say to him—if you wish to settle upon a portion of the public lands, and purchase the title, you can occupy any unsurveyed lands which are vacant and have not been reserved from sale; and, when the public surveys are made and returned, the land not having been in the meantime withdrawn from sale, you can acquire, *by pursuing certain steps*, the right to purchase them. If those steps are *from any cause* not taken, the proffer of the government has not been accepted, and a title in the occupant is not even initiated. *The title to the land remains unaffected*, and subject to the control and disposition of the government, as before his occupancy.”

The principles announced in the foregoing decisions, we repeat, have never been departed from. The Nelson case is in strict accord with them. It holds that occupancy in good faith of unsurveyed land in an odd numbered section within primary limits at date of definite location will except the land occupied from the

grant; but nothing is said in the opinion to indicate that the court has departed from the principle that the occupant must manifest his good faith by an entry within the time required by law.

In further support of its decision reversing the decree of the Circuit Court, the Court of Appeals refers to its own opinion in *Railway Company v. McCormick*, 94 Fed. Rep. 932. But the decision in the McCormick case is in strict accord with the construction which, as we contend, the Nelson case must bear. In the McCormick case, as in the Nelson case, the person in possession of the unsurveyed land when map of definite location was filed, *made his entry within the time prescribed by law* after completion of the survey. This point is brought out by Judge Morrow in the decision where in distinguishing the Colburn case he says: "The facts in that case did not require the court to determine the effect of a settlement upon public land by a qualified settler, followed by pre-emption entry *within the time prescribed by law*." And as showing that the distinction upon which we are here insisting was present at least to the mind of the author of the opinion in the McCormick case, we call the court's attention to the fact that Judge Morrow, who wrote the opinion in that case, has dissented vigorously from the opinion of the Court of Appeals in the case at bar, holding that the railroad company was clearly entitled to the land in question. (Transcript pp. 562-570.)

That this is the correct view of what was decided in the Nelson case appears very clearly from the only decision since rendered by this Court, in which, so far as we can find, this question has been considered or the doctrine of the Nelson case applied. We refer to *Ore-*

*gon & California R. R. Co. v. U. S.*, 189 U. S. 103.

That case involved the construction of a railroad grant, identical in its terms (so far as regards the present controversy) with the Northern Pacific grant; and in that case, as in the Nelson case, the railroad company had received patents from the government under its grant to the lands in question. That case involved lands within the indemnity limits of the grant. These lands had been occupied for years previous to the survey by homestead settlers. Immediately after survey and before any claims by the homestead settlers were filed, the railroad company selected the lands. After such selection, *but within the ninety days allowed by the act of May 14, 1880*, applications to enter the land as homesteads were made by the occupants. Mr. Justice Harlan, in holding that the rights of the occupants under these circumstances were superior to those of the railroad company, adverted again to the decision in the Nelson case, written by him but a few months before, and said:

But it is contended that as the selection by the company (except as to the tract which was occupied in 1869, before any selection by the company of lieu lands) was prior to the application by the respective settlers for entry under the homestead laws, its right to the lands in question was superior to that asserted by the settlers. This view is completely met by the fact that the settler, by prior occupancy in good faith, could avail himself of the homestead acts whenever, by an official survey, the way is opened by the government for him to do so, *and by the fact that, within ninety days after these lands were surveyed*, he filed in the proper office his application to enter them under the homestead laws of the

United States. He moved *with due diligence* to protect and perfect the right acquired by his occupancy of the land with the intention to avail himself of the benefit of those laws. That right was not to be affected or impaired by the fact that the lands were not surveyed at the date of occupancy. *Nelson v. Northern Pac. Ry.*, 188 U. S. 108, ante 406, 23 Sup. Ct. Rep. 302; *Ard v. Brandon*, 156 U. S. 537, 543, 39 L. Ed. 524, 526, 15 Sup. Ct. Rep. 406, 409; *Tarpey v. Madsen*, 178 U. S. 215, 219, 44 L. Ed. 1042, 1044, 20 Sup. Ct. Rep. 849, 850. In the *Ard* case, the court said:

“The law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon. If he does all that the statute prescribes as the condition of acquiring rights, the law protects him in those rights, and does not make their continued existence depend alone upon the question whether or not he takes an appeal from an adverse decision of the officers charged with the duty of acting upon his application.’ In the *Tarpey* case it was said that ‘the right of one who has actually occupied (public lands), with an intent to make a homestead or preemption entry, cannot be defeated by the mere lack of a place in which to make a record of his intent,’ that if a settler was in possession before definite location, ‘with a view of entering it as a homestead or preemption claim, and was simply deprived of his ability to make his entry or declaratory statement by the lack of a local land office, he could undoubtedly, when such office was established, have made his entry or declaratory statement in such way as to protect his rights.’ So, if the condition of the lands, being unsurveyed, prevents the making by a *bona fide* occupant of a proper application of record to enter them under the homestead laws his rights will not be lost, if, after the lands are surveyed, he applied *in due time* to enter the lands under

those laws. And such has been held to be the object and effect of the act of May 14, 1880, c. 89, 21 Stat. 140 (U. S. Comp. Stat. 1901, p. 1392). We could not otherwise adjudge in this case without holding that the mere selection of the lands by the railroad company displaced or destroyed the rights of a *bona fide* settler arising from previous occupancy with the intention of making the required homestead entry whenever he was permitted to do so. We cannot so hold. We adjudge that the rights which *bona fide* occupancy gave to the settler under the act of 1866 are not defeated by a mere selection afterwards of the lands by the railroad company—the settler having, after the lands were surveyed, *promptly* taken the necessary steps to protect his rights under the homestead laws. And in such case, the entry made under those laws, relates back to the date of settlement on the lands. It was so substantially held in *Nelson v. Northern Pac. Ry.* (188 U. S. 108, ante 406, 23 Sup. Ct. Rep. 302.)”

Here the superiority of the occupants’ right is expressly rested upon the fact that they moved within the period allowed them by the Act of May 14, 1880.

It will not be contended in view of the decision in the Colburn case, and the decision at this term in *United States v. C. M. & St. P. Ry. Co.*, *supra*, that the occupant of *surveyed* land within primary limits has any right as against the railroad company unless his entry is of record when the map of definite location is filed; his rights are fixed absolutely by the condition of the record at that time. He may be able to advance excellent excuses for not having it of record at that time, but these will not avail him. Though hardship may result in a particular case from the application of this rule it must be borne because of the neces-

sity of having a definite and fixed time at which the question of occupancy or non-occupancy shall be deemed settled.

Why is there any less necessity for such a rule in the case of lands *unsurveyed* when map of definite location is filed? Why should there not be a fixed time in the case of such lands when the settler's right either as against the government or the railroad company must be definitely and formally asserted? And what other period of time can this be than the period of ninety days after filing of the township plat, which is fixed by the Act of May 14, 1880?

Counsel say that the question whether lands unsurveyed when map of definite location is filed were at that time occupied in good faith by settlers remains open until patent is issued; and they refer to *Barden v. Northern Pacific R. R. Co.*, 154 U. S. 288, as supporting this. But that case announces no such rule. That case decided that the question *whether lands were mineral in character*, and so excepted from the grant, was open until patent issued; and this would be true (in the absence of direct legislation upon the question, and there was no such legislation when that case was decided) whether the lands were surveyed or unsurveyed at date of definite location. But it has never been held or suggested in any decision that the question whether lands *were occupied in good faith by a person intending to enter them* remained open in the same way.

The decision in the Barden case and the legislation which followed it illustrate strikingly what, as we have said, has all along been the view of both Congress and the courts as to the importance of promptly ascertain-

ing what lands passed to the railroad company under the grant. When that case came before the Supreme Court in 1894, it was recognized that the rule laid down in the decision would create a doubt as to the validity of the railroad company's title until such time as a patent, amounting to an adjudication that the land was non-mineral should issue; and in consequence of that decision and of the intimation contained in it that legislation should be enacted providing for a definite ascertainment of the character of the lands within the grant, the Act of Congress of February 26, 1895 (28 Statutes at L. 682) was enacted. That act provided for the examination and classification of these lands for the very purpose of removing whatever doubt should exist previous to the issuance of patent as to where the title lay, and of enabling the railroad company to convey a perfectly valid title to lands classified as non-mineral, even though patent had not issued.

The principle laid down in the *Barden* case was applied to the question whether lands were excepted from the grant by reason of their *physical character*. That question could be resolved by actual examination of the lands; and could be resolved as well at one time as at another. But when, two years later, in the case of *Northern Pacific Ry. Co. v. Colburn*, 164 U. S. 383, the question arose whether lands were excepted from the grant *because of their occupancy by bona fide settlers*, this court never thought of applying, for the determination of *that* question, the principle which it had laid down for determining the physical character of the lands. Had the principle for which counsel is here contending appealed to it as sound, it certainly would have been applied. The *Barden* case had been decided

only two years before. Yet by its unanimous decision the court in the Colburn case adhered to the principle which it had so many times previously announced that the good faith of the homesteader or other occupant must be attested of record in order to except the land from the grant.

Nor is it in the slightest degree inconsistent or illogical, nor does it work any hardship on the occupant to apply this rule. Certainly it is no hardship to hold him to that same diligence which he must exercise as against other claimants; and certainly it is no more illogical to say that the time when the railroad company shall definitely know what lands belong to it shall be fixed at ninety days from the date of filing of the plat of survey than it is to say that this time shall be fixed as the date of the issuance of the patent. On counsel's own contention where lands are unsurveyed when map of definite location is filed the question what lands actually passed to the railroad company must remain suspended until it shall have been resolved by the issuance of a patent; and it is no more illogical to say that this question shall be resolved at one time and in one way than it is to say that it shall be resolved at a later time and in a different way; and the purposes underlying the grant, as stated by this court in *Tarpey v. Madsen, supra*, require that the question shall be *promptly* resolved.

It is said that if the railroad company at any time between definite location and the death of Lammlein had sought to eject him it must have failed in the action. It is a sufficient answer to this argument to say that while the land was unsurveyed the railroad company could not have maintained ejectment or any other



action at law. *Northern Pacific Ry. Co. v. Hussey*, 61 ~~Dec.~~ 235; *United States v. Montana Lbr. Co.*, 196 U. S. 573. Until the odd numbered sections were defined by survey they were within the jurisdiction of the Land Department; *Humbird v. Avery*, 195 U. S. 480; and though it has been held in *Northern Pacific Ry. Co. v. Hussey*, *supra*, that the railroad company might maintain an *equitable* action to enjoin waste, the courts could not entertain an action at law to determine who was entitled to possession of them.

Counsel say that the rule we contend for would result in defeating the right of every *bona fide* homestead settler who was in actual possession of unsurveyed lands when map of definite location was filed and who died before completion of the survey. But this is not so. Under Section 2291, the widow or heirs of such a settler could, of course, prove up within the same time after the completion of survey that the law gives to the settler himself; and so (to take a case supposed by counsel in his brief below), if Lammlein had continued to occupy the premises until the day before the plats were filed in 1891, and had then died, his widow or his heirs might unquestionably have made a valid entry of the land within ninety days thereafter. But if, previous to his death, he had bargained away such possessory rights as he had in the land, it is surely unreasonable to hold that it is excepted from the grant by reason of its occupation in good faith with an intention to enter when survey should have been completed, in the face of evidence absolutely disqualifying the occupant as an entryman and conclusively negating any intention to enter. (34 Land Decisions p. 46.)

But even if it could be said that Lammlein was prevented by death from entering the land within ninety days after the survey, this excuse cannot be made for appellee. He claims to have succeeded to Lammlein's rights. He was in possession of the land when surveyed in 1891, and never applied to enter it until four and one-half years thereafter. If, as Lammlein's successor, he could assert Lammlein's rights during the ninety days following the filing of the township plats, he failed to do so. By his failure to do so, his rights expired under the Act of May 14, 1880, certainly as against the United States, and we insist that they expired equally as against the grantees of the United States.

The importance of this question is not to be measured by the amount of land involved in this case, and we ask the court in deciding it to consider the principle which appellee seeks to establish and how far-reaching would be the consequences of an authoritative announcement of that principle as one of railroad land grant law. The great bulk of the lands granted to the Northern Pacific Railroad Company were unsurveyed when map of definite location was filed. As they have been surveyed and identified, the odd numbered sections lying within primary limits and classified as non-mineral have been uniformly dealt with as belonging to the railroad company if *within the time allowed by the act of May 14, 1880*, no attempt has been made to enter them. The issuance of patents covering them is frequently delayed\* for years. In the case at bar, for example, though the plats of survey were filed in 1891 patent did not issue

until 1903. But if the decision appealed from is affirmed, the title to all such lands must remain uncertain. Anyone may seek to enter them and anyone will be allowed to enter them upon a mere *oral showing* that at date of definite location, A, B or C was living upon them and an *oral showing* that he intended to enter them. The occupant, as in the case at bar, may have been dead when survey was completed or may have abandoned the lands years before. The question of his citizenship and of his right to enter them may, as in the case at bar, be left altogether unsettled; the question of his intention to enter them at all would have to be resolved, as in the case at bar, by oral testimony, and that of a hearsay character; the impossibility of successfully meeting and overcoming such testimony concerning events so remote is obvious; and yet to a showing of such a character the rights of the railroad company must yield.

## II.

As already stated, this case has turned in both of the lower courts upon the point above discussed and accordingly we have devoted the greater portion of this brief to its consideration. But in a sense the point is not in the case because regardless of the question of the railroad company's right to the land, appellee's failure to show that he is entitled to it requires a dismissal of the bill. The legal title is in appellants; and appellee brings this suit in equity to have it decreed that this title is held in trust for him. It has been many times decided that in such a suit, complainant must suc-

ceed, not upon the weakness of his adversary's title, but upon the strength of his own and that unless it affirmatively appears that he is entitled to the land, he cannot prevail.

*Bohall v. Dilla*, 114 U. S. 47.

*Sparks v. Pierce*, 115 U. S. 408.

*Lee v. Johnson*, 116 U. S. 48.

This being so, the suit must fail because it does not appear that appellee is not the owner of one hundred and sixty acres of land in any state or territory.

Under section 2289 of the Revised Statutes, as amended by section 5 of the Act of March 3, 1891, "no person who is the proprietor of more than one hundred and sixty acres of land in any state or territory, shall acquire any right under the homestead law;" and in proceedings before the Land Department to obtain title to land under that law, the fact that the applicant is not the owner of this quantity of land is the first fact which must be made to appear. (See form of affidavit required by the Department, printed as an appendix to this brief.) Whether appellee is or is not the owner of this quantity of land has nowhere been shown in these proceedings. He could not acquire title from the government as a homesteader without showing it; and *a fortiori* he cannot divest others of the title which the government has given to them without showing it.

The failure of appellee's proof in this respect has been insisted upon at every stage of the suit. It was urged upon the Circuit Court when the case was brought on for hearing upon the testimony taken before the special examiner, at a time when, had the nec-

essary evidence been forthcoming, the court would doubtless, on application, have permitted appellee to supply it. That court held, however, that the railroad company was entitled to the land; and dismissing the suit upon that ground, it did not pass upon the point. It was again urged in the Court of Appeals as a reason for affirming the Circuit Court's decree. The Court of Appeals in reversing the decree makes no reference to it whatsoever, holding that appellee may deprive the legal owners of their title upon a showing which confessedly would be insufficient to obtain title in the first instance from the government.

As the Court of Appeals does not state the grounds upon which this conclusion is reached, we can only surmise that the argument of appellee's counsel in that court was thought to be a sufficient answer to the point. That argument, as developed in the brief below, was that as the answer of the railroad company was silent upon the question whether appellee was or was not the owner of one hundred and sixty acres of land, the point was not available, and that appellee's possession of this qualification was not a thing to be affirmatively proved by him but a thing to be disproved by us before the point would be available.

We cannot believe that so astounding a doctrine will receive the sanction of this court. To sanction it would be to reverse established rules of evidence and to place one who attacks a title in a better position than that of the one who possesses it. In a suit like this complainant must show in order by virtue of his rights under the homestead law to get the title from an individual in whom it stands, exactly what he must show to the government in order

to get title from it by virtue of his rights under that law. He is a suitor in a court of equity. He is asking for equitable relief. Principles as old as equity jurisprudence require that he shall fully and fairly state his case and prove it. One who neglects or fails to show non-ownership of one hundred and sixty acres of land is certainly not entitled, under the homestead law, to patent from the government; and assuredly his rights are not increased nor is the establishment of them to be facilitated merely because he is asserting them in a court instead of before the Land Department.

The unreason of relieving him from the burden of supplying this affirmative proof is well illustrated by the suggestion in counsel's brief below as to how the fact of ownership of one hundred and sixty acres of land should be developed and established. "If such a state of facts existed," they say, "defendant should have pleaded and proved it." But how could the defendants know anything about it? Must the railroad company, when brought into a court of equity to protect its property against one claiming to be equitably entitled to it, conduct an independent investigation to ascertain whether the complainant is really qualified to enter the land? To ask such a question is to answer it. The facts are in the possession of the complainant. They form an essential part of the equities upon which his claim rests. The burden is upon him to establish them; and having failed to establish them he cannot prevail.

CHARLES W. BUNN.  
CHARLES DONNELLY.

# APPENDIX. HOMESTEAD AFFIDAVIT.

U. S. Land Office at.....,  
....., 19.....

I, ....., of .....,  
having filed my application, No....., for an  
entry under Section 2289, Revised Statutes of the  
United States, do solemnly swear *that I am not the  
proprietor of more than one hundred and sixty acres  
of land in any State or Territory*; that I am (b)  
.....; that my application is honest-  
ly and in good faith made for the purpose of actual  
settlement and cultivation, and not for the benefit of  
any other person, persons, or corporation, and that  
I will faithfully and honestly endeavor to comply with  
all requirements of law as to settlement, residence,  
and cultivation necessary to acquire title to the land  
applied for; that I am not acting as agent of any per-  
son, corporation, or syndicate in making such entry,  
nor in collusion with any person, corporation, or syn-  
dicate to give them the benefit of the land entered, or  
any part thereof, or the timber thereon; that I do not  
apply to enter the same for the purpose of specula-  
tion, but in good faith to obtain a home for myself,  
and that I have not directly or indirectly made, and  
will not make, any agreement or contract in any way  
or manner, with any person or persons, corporation or  
syndicate whatsoever, by which the title which I  
might acquire from the Government of the United  
States should inure in whole or in part to the benefit  
of any person except myself; and further, that since  
August 30, 1890, I have not acquired title to, nor am  
I now claiming under any of the agricultural public  
land laws, an amount of land which, together with the  
land now applied for, will exceed in the aggregate  
three hundred and twenty acres, except.....  
and that I have not heretofore made any entry under  
the homestead laws except.....  
(Sign plainly with full Christian name.)

.....

Sworn to and subscribed before me this.....  
 day of....., 19....., at my office at  
 ....., in.....County,  
 .....

(b) Here insert statement that affiant is a citizen of the United States, or that he has filed his declaration of intention to become such, and that he is the head of a family, or is over twenty-one years of age, as the case may be. It should be stated whether applicant is *native born* or not, and if not, a certified copy of his certificate of naturalization, or declaration of intention, as the case may be, must be furnished. (See circular of Land Department of January 25, 1904.)







221 U. S. 208.

# Supreme Court of the United States

OCTOBER TERM, 1910.

No. 117.

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NORTHERN PACIFIC RAILWAY COMPANY,  
ALBION McDONALD and AGNES AUCHARD,  
as Administratrix with the Will Annexed of  
DAVID AUCHARD, Deceased,

*Appellants,*

v.

JOHN TRODICK,

*Appellee.*

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## BRIEF OF APPELLEE.

The brief of appellants would have given a more accurate idea of the case had it adverted to some features in respect to which it is silent.

The land in question was occupied at the time of the filing of its map of definite location by the Northern Pacific Railway Company in 1882, by one Martin Lammlein, who established his residence upon it in the year 1877. He settled upon the land, occupied and cultivated it, intending to acquire title to it as a homestead as soon as it should be surveyed, and making claim to it as his homestead.

Record, pages 520, 45, 48-49.

The land was unsurveyed at the time of the filing

of the map and continued so until August 10, 1891, when the plats were filed in the local land office. Lammlein continued to reside on the land until his death in 1889. Shortly before he departed this life, he sold his improvements to the appellee, Trodick, who took possession upon his death, intending to acquire title to the land under the homestead law. He has since continuously resided on it. He delayed applying to enter the land until July 6, 1896, when he was denied the right to do so without prejudice to his right to apply to be heard as to the conditions that existed on July 6, 1882, when the map of definite location was filed.

He made such application and upon the hearing on December 24, 1898, his application was rejected by the Honorable Commissioner of the General Land Office, who ruled that under the decision in

*N. P. R. Co. v. Colburn*, 164 U. S. 537, he could assert no right as against the railway company because there was no claim of record at the time of the filing of the map of definite location.

The Commissioner's opinion on the case as presented to him is as follows:

**"DEPARTMENT OF THE INTERIOR.**

**"United States Land Office,**

**"Washington, D. C., Dec. 24, 1898.**

**"Register and Receiver, Helena, Montana.**

**"Sir: I have considered the case of John Trodick vs. Northern Pacific R. R. Co., in-**

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volving the SE.  $\frac{1}{4}$ , Sec. 35, Tp. 15 N., R. 4 W., situated within the primary limits of the grant to the company, the right of which attached July 6, 1882, when the map of the definite location of its road was filed.

"The plat of survey embracing the land was filed in the local office August 10, 1891, and the tract was listed by the company September 21, 1892, per list No. 215.

"The records of this office show no pre-existing adverse claims to the same.

"Mr. *Trodrick* applied to make homestead entry for the land January 10, 1896, and being refused he appealed to this office, which affirmed your action May 26, 1896, without prejudice to his right to apply for a hearing to determine the status of the land July 6, 1882, when the right of the company became effective.

"He applied for a hearing August 10, 1896, whereupon notice issued citing the parties in interest to appear at your office September 21, 1896. The hearing was continued from time to time until April 16, 1897, when both parties were represented.

"It appears from the evidence adduced that one Martin Lemline established his residence on the land, with his family, in 1877, continued to reside there until his death, some time in 1891, and his improvements on the premises were of the estimated value of \$1,000.

"Mr. *Trodrick* settled on the land in 1891, and since then has continuously resided there.

"The material question for determination in this case is this: Did the settlement claim of Mr. Lemline except the land from the operation of the grant to the company?

"It is undoubtedly true that the land was occupied by Mr. Lemline when the right of the company attached, that he was qualified to make entry of the same and settled there with the intention of doing so, as the circumstances indicate. Had he lived until the plat of survey was filed in your office, he or his wife,

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would, without doubt, have been allowed to perfect the claim by them initiated prior to July 6, 1882.

"Since Mr. Lemline had no claim of record, and the claim of *Trodrick* had its inception subsequent to the definite location of the road, it must be held that the land inured to the grant. (*N. P. R. R. Co. v. Colburn*, 164 U. S. 537.)

"Your action is therefore approved and the application of *Trodrick* is accordingly rejected, subject to the usual right of appeal within sixty days. You will advise him of this action, and make prompt report at the expiration of the appeal period.

"The company will be notified from this office.

"Very respectfully,

"BENJ. HERMANN,

"Commissioner."

J. T. A.

Record, pages 502-504.

The present record shows that the appellee settled on the land on buying the place from Lammlein in 1889, not in 1891, as recited in the opinion quoted above.

He is an old man, over eighty-three years, unable to read or write English,

Record, page 157,

who makes his mark instead of signing his name to his testimony.

The land was patented to the railway company January 10, 1903. In March, 1904, he began this action to have it adjudged to hold the title in trust for him.

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## I.

**THE RIGHT OF THE RAILWAY COMPANY.**

The right of the appellee to this land rests upon the decision of this court in

*Nelson v. N. P. Ry. Co.* 188 U. S. 108, decided January 26, 1903. The proposition determined in that case, bearing in mind that the court was considering the case of land that was unsurveyed at the time of the filing of the map of definite location, is gathered from the following from the syllabus:

“Continuous occupation of public land with a bona fide intention to acquire it under the homestead laws as soon as it shall be surveyed, constitutes, when begun prior to the definite location by the Northern Pacific Railway Company of its route, a ‘claim’ upon the land within the meaning of the act of congress of July 2, 1864, chapter 217, (13 Stats. at L. 365), Sec. 3, restricting the grant in and of such railroad to such odd-numbered sections within specified limits as were free from pre-emption or ‘other claims or rights’ at the date of definite location, and authorizing the company to select other lands in lieu of any found at that date to be occupied by homestead settlers.”

Inasmuch as the land was occupied under a bona fide homestead claim at the time of the filing of the map of the definite location of the road in 1882, the grant did not attach to it at all.

The right of the Northern Pacific Railway Company to the land is to be determined by the conditions existing on the 6th day of July, 1882, when its

map of definite location was filed. It became the owner of the land on that day by virtue of its grant, or it never did. If there existed at that time a bona fide homestead claim attaching to the land, it was excepted from the grant and did not pass.

If the Northern Pacific Railroad Company had at any time prior to his death brought action to oust Lammlein from the possession of the premises, or to recover from him the value of the use and occupation thereof, it must inevitably have failed. It could not have proved title. His occupancy of the premises, claiming the same as a homestead settler at the time of the filing of the map of definite location, the land being unsurveyed, would overcome the claim of the railroad to it.

As the grant did not attach to it, as it was excepted from its operation by the conditions existing at the time of the filing of the map of definite location, it remained public land subject to Lammlein's right to enter it as a homestead. If for any reason he did not enter it as a homestead, or his right to the land, for any reason, terminated, it dropped back into the general body of the public lands. The grant to the railroad company, which had become fixed and definite as to all non-mineral lands, immediately on the filing of the map, did not, after the manner of an elastic blanket, expand and take it in. It became subject, whenever Lammlein's rights terminated, to entry under any of the



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laws of the United States for the appropriation of the public domain, applicable to land of that character, to pre-emption, homestead or other similar entry.

Whether Lammlein sold to appellee his improvements on the land or attempted to sell his right to the possession, or any rights in the land, is utterly beside the question. He could transfer no rights to the land. He could, of course, make terms with any one as a condition of surrendering the possession and the transfer of his improvements.

The brief of the appellants seeks to impress the court with the idea that some offense was committed in fraud of the land laws in the transfer from Lammlein to appellee.

This court has frequently recognized the right of the settler to bargain for the surrender of the possession of public lands occupied by him, and the validity of contracts founded upon such a consideration has been repeatedly affirmed.

In

*Catholic Bishop of Nesqually vs. Gibbon*,  
158 U. S. 155,

this court, after remarking that the pioneer had always been regarded as entitled to favorable consideration, quoted as follows from

*Lamb vs. Davenport*, 18 Wall. 307:

“Of course, no legal title vested in any one by these proceedings, for that remained in the United States—all of which was well known

and undisputed. But it was equally well known that these possessory rights, and improvements placed on the soil, were by the policy of the government generally protected, so far, at least, as to give priority of the right to purchase whenever the land was offered for sale, and where no special reason existed to the contrary. And though these rights or claims rested on no statute, or any positive promise, the general recognition of them in the end by the government, and its disposition to protect the meritorious actual settlers, who were the pioneers of emigration in the new territories, gave a decided and well understood value to these claims. They were the subjects of bargain and sale, and, as among the parties to such contracts, they were valid."

It is a fair assumption that the railroad grant acts were not so framed as that the grant would expand and take in lands subject to claims at the time of the filing of the map of definite location when, for any cause, the right of the occupying claimant should terminate, because such a provision would deny to him the opportunity to sell his holdings and practically operate to forfeit his improvements to the railroad company should he attempt to do so, or, unfortunately, die, before his claim was perfected.

Appellee could acquire no right, in or to the land by reason of any conveyance or sale from Lammlein. He was in no better position than one who should take possession and occupy the premises upon their abandonment by Lammlein. But such an occupant would have a perfect right to enter

the premises as a homestead. The railroad company has no right to it. Its grant never did attach to it. Lammlein's right is gone by reason of his abandonment. It is in the same condition as any other piece of public land open to appropriation by any comer.

At page 24 of the brief of appellants the assertion is made that appellee "claims to have succeeded to Lammlein's rights."

No such claim is made by appellee at all, as heretofore shown. The preference right to enter is, as shown, not transferable. The actual possession of a homestead occupant before survey may be delivered up, but he can transfer no *right* to possession. There was and could be no "succession" to Lammlein's rights in any one. His death terminated his possession if it had not ceased prior thereto on the sale of his improvements. Such right as appellee then had, he had by virtue of his being a qualified homesteader in the occupancy of land open to disposition under the homestead law, intending to enter it as a homestead.

Herein was the error of the learned trial judge. It is evident that he labored under an impression that the complainant must trace a relation of succession between himself and Lammlein, making his claim thus by relation antedate the filing of the map of definite location, and becoming entitled to the land only in case Lammlein had done everything

which would entitle him to a patent. His views are thus expressed:

"By the act of congress of May 14, 1880 (Vol. 21, U. S. Statutes at Large, 140) the settler upon public unsurveyed lands, who intended to claim under the homestead laws, was allowed the same time to file his homestead application, and to perfect his original entry in the United States land office, as was allowed to a pre-emption settler to put his claim on record, and it was provided that his right should relate back to the date of settlement, the same as if he settled under the pre-emption laws. This would have given Lammlein, had he lived, ninety days after the filing of the township plat (August 10, 1891), within which time he was obliged to put his application for entry on file, so as to become of record. He had sold, however, to Trodick in 1889, so that the very best possible position that may be conceded to Trodick is such as Lammlein could have occupied, if he had not sold, and had lived until after the plats of survey were filed. But even upon such a concession, it became his duty, as it would have been Lammlein's duty, to file his application for homestead within ninety days after the filing of the township plat in 1891. He failed to do so, though, and by his omission he lost his rights to enter the land under the homestead laws."

But the court lost sight of what was decided in

*N. P. R. Co. vs. Sanders*, 166 U. S. 620,

and the application made of it in the Nelson case.

In that case it appeared that the ground in question at the time of the filing of the map of definite location was covered by and embraced in certain placer mining locations, and there were pending

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in the local land office applications for patents under such locations.

Really, the lands never were subject to entry as placer, and it was conceded in the action that they "did not contain gold or other precious metals in paying quantities or in such quantities as to make the same or any part thereof commercially valuable."

In fact, Sanders, asserting that the lands were non-mineral, after the map of definite location was filed, entered the lands as agricultural in character and they were patented to him.

The action of the land department in patenting the lands to Sanders was approved, the Court holding that the railroad company never got any title to them, that its grant never attached to the land involved, and that on the extinction of the mineral claim they became subject to appropriation as other public lands.

The court went farther and said:

"Indeed if it now appeared that the land office finally adjudged, after the definite location of the road, that the lands embraced by those applications were not mineral, they could not be held to have passed to the railroad company under the act of 1864, for the reason that they were not, at the time of such definite location, free from pre-emption or 'other claims or rights.' "

As in that case, it was immaterial whether by reason of any condition then existing or by reason

of any omission on their part after the filing of the map of definite location, the mineral claimants might find themselves, as they evidently did, unable to perfect their title and to obtain patent, so in this case it is immaterial whether Lammlein, after the filing of the map of definite location, by any deed of commission or by any omission on his part, placed himself in a position where he could not claim a patent to the land. The determinative question is, was there a *bona fide* claim to the land at the time of the filing of the map of definite location? If there was, the Northern Pacific Railroad Company has no right to the land under its grant, nor have its assignees, claiming thereunder.

A considerable quantity of evidence was introduced touching the question as to whether Lammlein sold to the appellee, as the latter claims, or to one Houghton, who sold to appellee, as the appellants claim. It is utterly immaterial what the fact is as to this matter or whether he sold to either. The claim of the appellee is in no manner dependent upon his connecting himself either directly or indirectly with Lammlein, further than to show Lammlein's claim to the land, his possession and occupancy with intent to enter it at the time of the filing of the map of definite location. This very matter was considered and disposed of in the Sanders case, as witness the following from the opinion:

"But it is said that no account is to be taken

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of those applications (of the mineral claimants) for the reason that the present defendants, who had nothing to do with them, and had no interest in them, confess in their answer that the lands in question did not contain gold or other metals in paying quantities or in such quantity as to make the same, or any part thereof, commercially valuable therefor; that the lands are therefore to be regarded as agricultural lands that passed to the company under the act of 1864, and were preserved to it by the filing of the map of the general route in 1872 and by their withdrawal in that year by the general land office 'from sale or location, pre-emption or homestead entry.' This view overlooks the fact that the express declaration of congress was that no public lands should pass to the company to which at the time of the definite location of the road the United States did not have title free from preemption, or other claims or rights.' "

The doctrine thus announced, that upon the subsequent determination of the claim outstanding against any particular tract at the time of the definite location of the road, without such claim culminating in a patent, the grant to the railroad company did not open and embrace it, had, it was shown, been repeatedly asserted by the court. The court referred to its ruling in

*Kansas R. R. Co. vs. Dunmeyer*, 113 U. S. 629,

in which it appeared that a certain tract of land was embraced in a homestead entry at the time the line of the road was definitely fixed, the grant containing reservations similar to the one under consideration. The homesteader subsequently aban-

doned the claim and the railroad company asserted that thereupon "the grant by its inherent force reasserted itself and extended to or covered the land as though it had never been within the exception." But the court declined to adopt this view, and held that the land on its abandonment by the occupant, became subject to appropriation like any other public land.

Reference was made to

*Hastings V. D. R. Co. v. Whitney*, 132 U. S. 357,

and the following quotation made from the opinion :

*"For the foregoing reasons we concur with the court below that Turner's homestead entry excepted the land from the operation of the railroad grant; and that upon the cancellation of that entry the tract in question did not inure to the benefit of the company, but reverted to the government and became a part of the public domain, subject to appropriation by the first legal applicant."*

The particular proposition determined in the Sanders case to which effort has been made to direct attention is found embodied in the following terse comment on it in the opinion in the Nelson case, namely :

*"In the same case the court, after observing that as the lands there in dispute were not free from claims at date of definite location, it was of no consequence what was done with them after that date."*



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The Nelson case is identical in all essential respects with the case before the court. In that case, as in this, the land was unsurveyed at the time the map of definite location was filed. It was, however, at that time occupied by a settler with the bona fide purpose of entering the same under the homestead laws as soon as it should be surveyed. That condition, the court held, operated to exempt it from the grant. It was excepted out of it. The grant never attached to it.

Now, the only difference between the two cases is that in that case the homesteader continued to live on the land until it was surveyed, and when it was he promptly attempted to enter it. His application was rejected, the land office holding that the land passed to the railway company under the grant. But the supreme court of the United States reversed the supreme court of Washington, holding, as above indicated, that the claim or right of the homesteader was embraced within the language "other claims or rights," in the granting act, and consequently the company got no title to it.

But in view of the decisions of the supreme court adverted to, the fact that the homestead claimant in the Nelson case continued, after the filing of the map of definite location, to reside on the land and promptly applied to enter it when surveyed, is of no consequence. Suppose he had not? Suppose, as in the Dunmeyer case or the Whitney case, he

had subsequently abandoned it. The railroad company could assert no title to the land. It would, as said in the Whitney case, have reverted to the government and become a part of the public domain, subject to appropriation by the first legal applicant.

Suppose he had continued to reside on the land, but had neglected to make his application to enter within the time limited by the act of May 14, 1880. By no possibility, under the repeated decisions of the supreme court, could the railroad company be advantaged under the grant here involved by his delinquency. He would subject himself to the risk of losing the land by reason of the filing of an application by some other qualified appropriator, but the railroad grant had become fixed and bound many years before, and he would be in no peril from it.

There is no difficulty whatever in distinguishing this case from

*N. P. R. R. Co. v. Colburn*, 164 U. S. 383.

In that case all that appeared was that at the time of filing the map of definite location the premises were occupied and cultivated by one Kelly. It was not shown that he made any claim to the land under any law of the United States, that he intended to enter the land as a homestead or pre-emption, nor does it appear from the opinion whether the land was surveyed or unsurveyed. If the land was surveyed and the ninety-day period

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within which he was required to file had expired, even if he did occupy with intent to enter as a homestead or pre-emption, it might well be held that he had no longer any "claim" or "right" to the land, and that as against any beneficiary of a grant taking effect thereafter or any legal appropriator the land was public and free from "claim" or "right." The land office appears to have believed that it was decided in the Colburn case that in order to constitute a "claim" such as would operate to exclude a tract from the grant, such "claim" must be of record in the land office. The case certainly does not so decide. It simply holds that there was not enough shown to except the land from the operation of the grant.

But the Nelson case and the case of

*Oregon & Cal. R. R. Co. v. U. S.*, 189 U. S. 103,

now to be adverted to, point out that the homesteader or pre-emption claimant on unsurveyed lands cannot make any filing in the land office, nor any record there, of his claim; and they hold that he cannot be prejudiced by the fact that he is afforded no opportunity under the law to make a record. It would be most unjust to the pioneer to allow his holding, which he subjugated before the railroad came, to be appropriated by it when eventually the land should be surveyed, by giving

to the word "claim" in the act a significance so narrow as to exclude his most meritorious claim.

The Oregon & California Co. case reasserted the doctrine of the Nelson case, the opinion of the Court in each being written by the same learned Justice.

In that case the company sought to select the lands in question under the lieu provisions of the grant. They had been occupied previous to the survey by homestead settlers, and immediately thereafter the railroad selections were filed. Within the ninety-day period the homesteaders filed their applications, and it was held that they and not the railroad company, were entitled to the land. The case is here adverted to because it emphasizes the point decided in the Nelson case, that the "right" and "claim" of the occupant was not to be prejudiced by the fact that the lands were not surveyed at the date of occupancy.

Speaking of this case the brief of appellants herein says:

"Here the superiority of the occupants' right is expressly rested upon the fact that they moved within the period allowed them by the Act of May 14, 1880."

Quite right. It will be noted, likewise, by the court that the adverse right asserted was initiated after the survey had been made and before the expiration of the ninety-day period. If at any time between three months after August 10, 1891, and January 10, 1896, the appellant company had

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selected these lands under the lieu provision of the grant, or a qualified homesteader had tendered a filing, or an application had been made to enter under any other law for the disposition of the public domain, the right of the appellee to the land would be gone. The case adverted to simply holds that his right to enter guaranteed to him by the statute at any time within the ninety-day period cannot be defeated by any person who endeavors to initiate a right within that time. If he complies with the statute, he gets the land though some one else beat him to the land office after the survey was made.

Reference was made above to the predicament in which Lammlein would have been had he continued to reside on the land and failed within three months after the land was surveyed to file his application to enter—namely, that the land would become subject to appropriation by any legal applicant. So, if this appellant railway company should, after the expiration of the three-months' period, select this tract with other lands under the lieu provisions of its grant or under the act of 1899, commonly known as the Mount Rainier Forest Reserve act, or any other act entitling it to select lands, its superior right could not be denied. It would be in the position of any other appropriator and the rights of Lammlein would succumb.

So with appellee Trodick. He did not apply to enter within the three months' period and if, after

that time and before he applied to enter, any legal applicant had filed on the land, his rights would be gone. But unless intervening rights have attached it is entirely immaterial how long he delayed about making his application.

That appellee's right to the land, except against claims initiated intervening the filing of the survey and his own application to enter, would not be prejudiced by any delay, was expressly ruled by this honorable court in

*Whitney v. Taylor*, 158 U. S. 85; and in *Lansdale v. Daniels*, 10 Otto, 113.

The decisions of the land department as to this have been uniform. Settlement initiates the right, and under the statute application must be filed within ninety days after the survey. But delay in doing so is immaterial unless there are intervening rights.

*H. B. McLean*, 6 L. D. 653.

The same principle finds very general application.

The filing must be made within three months after settlement in case of pre-emptions, but delay in doing so is of no consequence unless meanwhile some one else has filed.

*Johnson v. Towsley*, 13 Wall. 72.

A pre-emption entry had to be completed within a

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certain limited time after the filing of the declaratory statement, by making proof and paying for the land, but no right was lost by delay in doing so unless after the time limited and before the tender, some one else initiated a right to the land.

*Chicago, Milwaukee & St. Paul Co.*, 9 L. D. 221.

*J. B. Raymond*, 2 L. D. 854.

It is likewise recognized in the law applicable to the disposition of mineral claims. The right is initiated by discovery and marking the boundaries and must be completed under the local laws by filing a certificate within a certain time. But delay in the filing of the certificate is unimportant unless some one else locates after the time allowed and before the record is made.

1 *Lindley on Mines*, 390.

So there was no reason to deny appellee's application to enter the land by reason of any delay on his part in presenting it after the survey. Indeed the land office recognized no objection to the application on that ground. The action of the Commissioner was based on the Colburn case, which clearly was not governing and was misapplied.

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Because it might possibly be inferred from the language of some of the opinions of the Supreme Court of the United States in construing railroad

grants, as the Honorable Commissioner evidently inferred from the opinion in the Colburn case, that in order to constitute a "claim" within the meaning of the word as used in the excepting clause of the Northern Pacific grant, there must have been a land office record of it, the following is quoted from the later decision in the Nelson case, namely:

"As the railroad had not acquired any vested interest in the land when Nelson went upon it, his continuous occupancy of it with a view, in good faith, to acquire it under the homestead laws as soon as it was surveyed, constituted, in our opinion, a *claim* upon the land within the meaning of the Northern Pacific act of 1864; and as the claim existed when the railroad company definitely located its line, the land was, by the express words of that act, excluded from the grant."

And then, having referred to the lands excepted as being such as are subject to "other claims or rights" than pre-emption claims, and to the language of the lien clause granting the right to select in place of tracts "occupied by homestead settlers", the opinion continues:

"The words 'occupied by homestead settlers' show that congress intended by the charter of the Northern Pacific Railroad Company—whatever it may have intended as to other companies receiving grants of public lands—that occupancy by a homestead settler, with the intention to take the benefit of the homestead laws, constituted a *claim* which, existing at date of definite location, would exclude from the grant land that might otherwise be covered by it. \* \* \* If it be said that Nelson's

claim was that of mere occupancy, unattended by formal entry or application for the land, the answer is that that was a condition for which he was not in any wise responsible, and his rights in law were not lessened by that fact. The land was not surveyed for twelve years after he took up his residence on it, and under the homestead law he could not initiate his right by formal entry of record until such survey."

And then the court shows the inapplicability of the case of N. P. R. R. Co. v. Colburn, distinguishing it by the fact that in that case the settlement was made upon surveyed land and that the occupant had not made his filing prior to the filing of the map, though he had an opportunity to do so.

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The appellants, admitting that if the land in question was occupied by a *bona fide* homestead settler on the 6th day of July, 1882, intending to file as soon as the land should be surveyed, it was excepted from the grant to the Northern Pacific Railroad Company, advance the contention that either the fact of occupancy or the *bona fides* of the purpose of the settler to enter is to be determined, not by evidence such as would ordinarily be considered as tending to establish such facts, but by whether the land office record shows, within three months of the filing of the plat of the survey, an entry by the person occupying the land at the time of the filing of the map of definite location. Nothing that was

said in the Nelson case nor anything that can be gathered from the earlier decisions of this court, lends any support to such alleged rule of evidence.

It is true the learned Justice writing the opinion in the Nelson case makes reference a number of times to the fact that the settler made his filing as soon as the land was surveyed. That was one of the facts of the case. It was a circumstance clothing his case with a special equity. It would have been harsh indeed to take from him, under those circumstances, the home he had established and improved before the railroad company had earned any right to the land by preparing to build into the region in which it lay.

But there is absolutely nothing in anything that was said by the court or in the conclusion that was reached that could lead to the conclusion that the fact adverted to was vital to the case, and the reasoning by which the court awarded Nelson the land forbids the belief that it was vital to the case. The line of reasoning compels the conclusion that the railroad company's right to the land was utterly gone years before, that it never did attach, by reason of his occupancy at and prior to the filing of the map of definite location. And there is nothing that can possibly induce the belief that the company's right being gone, the court considered his own right to the land would be any the less clear though he had delayed beyond the three months' period in making his filing.

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The court referred to the fact that he did apply to enter as soon as the plats were on file, rather to show that though entrymen in general occupied a position of so much equity, the construction of the grant contended for by the railroad company would deny to them the land that had been made valuable by their pioneer efforts.

The fact was by no means vital, but it was important as showing the inequity that would be wrought if any construction other than that given the grant by the court should be adopted.

There are many reasons for rejecting the rule of evidence which appellants seek to have established.

In the first place there is no sort of relation between the recitals of the application to enter by a homesteader, filing in 1891, and either his occupancy in 1882 or the *bona fides* of his intention to enter the land as a homestead when surveyed.

The application to enter as a homestead, unlike the declaratory statement of a pre-emptioner, says nothing at all about when the applicant settled on the land.

Sec. 2290, R. S. U. S. (As amended by Act of 1891.)

The pre-emptioner could not file his declaratory statement until he had settled on the land. The homesteader files as the initial act in the acquisition of title, though in a contest with another claim-

ant he may insist on a right to the land as of his date of settlement, if that antedated his filing.

It is strange that the absence of an official document which says nothing at all about settlement or occupancy, even at the time it is filed, should be deemed conclusive proof that land was not *occupied by a homestead settler* nine years before.

Reference is made in this connection to

*N. P. R. R. Co. v. Colburn*, 164 U. S. 383.

In that case it was not held that the want of a filing in the land office was proof either of non-occupancy or want of good faith. The land had been surveyed. Under the circumstances an opportunity existed to file and the occupant did not file. The holding was that the rights of the railroad company having attached while the occupant was in default, he was to be deemed to have no claim, just as if the map of definite location in this case had been filed after 1891, the complainant would be deemed to have no *claim* to the land.

In

*N. P. Ry. Co. v. DeLacey*, 174 U. S. 622,  
the ruling was quite in keeping with the same theory.

The court held that though there appeared on the records of the land office at the time of the filing of the map of definite location a pre-emption declaratory statement, as the time had gone by within

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which proof should have been made when the map was filed, its vitality was gone and it could not be considered as constituting a claim.

The holding in these cases was not that the absence of the requisite record was conclusive proof of non-occupancy, abandonment or want of good faith, but that under the circumstances whatever claim there ever had been had expired, no longer existed at the critical period,—the date of filing the map.

The real ground upon which the lower court decided the DeLacey case was that though the record showed the existence of a pre-emption filing at the time the map was filed, it could be and was shown that the settler had actually *abandoned* the claim before that time.

*N. P. Ry. Co. v. De Lacey*, 66 Fed. 450.

Inferentially, at least, it held that the fact of a subsisting claim at the time of the filing of the map of definite location, of occupancy, and every other fact entering into the question, could be shown by any relevant testimony.

The case of

*Tarpey v. Madsen*, 178 U. S. 215,

may as well be mentioned here, since some support for the position of the appellants is claimed for it. In that case the map of definite location was filed October 20, 1868. At that time there was no land office in which the pre-emptioner could file. The

office was opened some time in April or May, 1869. On May 29th, one Olney filed a pre-emption declaratory statement, alleging settlement April 23, 1869. It will be noticed that the date of settlement *as recited* was after the filing of the map. Olney afterwards abandoned the land and Madsen homesteaded it after it had been *for years in the possession of the railroad company*.

The court held that waiving the question as to whether it could be shown that Olney had, in fact, contrary to the recital of his declaratory statement, settled on the land prior to October 20, 1868, as the evidence tended to show, there was nothing in the record to establish, as a fact, that his occupancy of the land prior to that date was with intent to acquire title to it from the United States.

None of these cases afford any support to the novel rule of evidence which the appellants assert.

To resume the discussion of the reasons which forbid its acceptance.

Proof that a man did not make a filing upon a certain tract of land in 1891, except by operation of an arbitrary rule of law, is certainly no proof that he did not occupy it in 1882, and is only the feeblest kind of evidence, if it is evidence at all, that occupying it, if he did in 1882, he then had no *bona fide* purpose to enter it.

He had abundant time meanwhile to change his mind. Any one familiar with the development of



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our country knows how often the settler has taken up his residence upon a piece of land, filled with hope and the fixed purpose of acquiring title to it, and after attempting for a time to make a living off it, and then giving up the struggle has abandoned it, leaving the land to be taken again, possibly, by later comers.

Even if Lammlein had abandoned this land, say in 1889, as is charged in the brief of appellants, that fact would not establish that he did not have a *bona fide* intent to acquire the land in 1882. But he died before the land was surveyed and sold the place on his death-bed to appellee. Had he continued to live on the land until after 1891 it might be permitted to submit in evidence that his failure to enter *promptly* when he had an opportunity was evidence that he never intended to enter. But he died and, anticipating his death, sold the place. Certainly Trodick's failure in 1891 to enter is no proof that Lammlein had no intention in 1882 to do so.

The rule contended for would give to the railroad company the benefit of the labor and toil of every settler going on an odd-numbered section before the survey and the advent of the railroad, if he happened to die after the filing of the map of definite location, while waiting for the government to complete the survey.

If the only competent evidence of the good faith

of the occupant at the time of the filing of the map of definite location is, as contended, the making of a filing by the party who occupied the premises, within three months after the survey is filed, such proof must inevitably be wanting if he dies meanwhile.

Oftentimes land so appropriated and improved by the pioneer becomes of great value before the survey.

To the foregoing argument advanced before the Circuit Court of Appeals, it is answered, in the brief filed in this court, that it is without weight because by reason of the provisions of Section 2291, the widow of a settler, or, in case of her death, his heirs, may make proof and obtain a patent to his homestead. But this is a palpable error.

Section 2291 of the Revised Statutes of the United States contemplates the case of a tract which has been *entered*, on which a claimant has made a filing, of which he has made entry according to the provisions of Sections 2289 and 2290.

A homestead entry cannot be made of unsurveyed land, and there is no entry until the claimant has complied with the provisions of Section 2290.

*Hastings v. Whitney*, 132 U. S. 357.

The discussion does not concern itself with one so circumstanced, but with one who has made a settlement, but who, by reason of the fact that the land

is unsurveyed, has been denied the opportunity to make an entry.

A homesteader acquired no rights by virtue of any settlement he made on the land until the act of 1880 was passed.

Section 2291 was in existence prior to the date when it came into being and, of necessity, could not reach the case of one whose only rights are such as he enjoys under the act of 1880. There is no provision in the law for the devolution of the preference right of entry given by the act of May 14, 1880. Doubtless if the widow was residing on the land at the time of the death of the claimant, she would be held to have initiated a residence and settlement in her own right immediately. If she lived apart from her husband she could make no such claim. Anyway the instant he died, under the rule contended for by the appellants, the claim of the railroad company would attach to the land, as no one could assert any claim because of *his* settlement—his widow and heirs being in no better position than strangers.

This was what was decided, and all that was decided, in

*Burton v. Trarer*, 130 U. S. 232.

cited by appellants as another case "directly in point."

The logic of the opinion in that case forbids any

such conclusion as is sought to be drawn from it by the appellants. The pre-emption right, it holds, is in the nature of a continuing offer by the government to the settler, to the effect that he shall, if the land is not meanwhile withdrawn from sale, have the first right to enter it, upon the survey being made and returned.

If we assume that continuously from the time he settled on the land in question until he died, and uninterruptedly after the filing by the railroad company of its map of definite location the government was promising Lammlein that as soon as this tract of land was surveyed he should have the right in preference to any one else to enter it, we must likewise assume that the land continued after 1882 to be public land, which the government had a right to dispose of, not land which it had already disposed of to the railroad company.

The whole theory of the brief to the effect that there is some unbending rule of evidence that the "good faith" of the settler, the *bona fides* of his occupancy at the time of the filing of the map of definite location, can be established only by the fact of his making a filing in the land office within the time limited by law, after the survey, has no better support than the bare comment of Mr. Justice Harlan in the Nelson case, in his reference to the Colburn case, to the effect that the lands therein brought into question *being surveyed* the "good

faith of the occupation had not been manifested by an entry or an attempt at entry at any time in the local land office."

Undoubtedly, if the land was surveyed at the time the alleged settlement was made, the omission to make entry at once would be the strongest kind of evidence that the occupant had had no *bona fide* purpose to enter. Likewise if the survey was made very shortly after he went upon the land, his neglect to file would be persuasive evidence that he had not theretofore entertained any fixed purpose to enter. But if the survey was not made until he had resided continuously on the land with his family, for fifteen years, improving and cultivating it, declaring repeatedly his purpose to enter the land as a homestead, it would be a queer rule of law that would deny to him the land because of *want of good faith*, simply because he allowed the period limited by statute after the survey to lapse before making his filing. He might lose the land, and of course he would if any right was initiated before he tendered his filing, but he would lose it, not because of the want of good faith in his settlement or occupancy, but because of a fixed provision of the law which renders useless to him the very best faith, the utmost of honesty in intention. He may have deferred because he had not learned of the surveys, or because, being aged and unlettered, like the appellee in this case, he was uninformed or unmindful of the

necessity of filing promptly upon the making of the survey. He loses the land to any one securing an intervening right, but not because of any lack of *bona fides* on his part.

But it is not only in cases where death intervenes that the railroad would enrich itself through the labor of others under the rule contended for.

In every case where the original occupant sold his place a similar result would ensue. In fact, that is just what is claimed in the brief in this case, that Lammlein having sold the place, he thereby abandoned it and disqualified himself from entering it, so it belongs to the railroad company. Congress never could have intended to work such oppression. It would be a wanton disregard of the rights of a most deserving class of citizens if the sale of his holdings by a settler, prior to survey and after the filing of the map of definite location, should operate to devote the land, against the claims of his successor, to the railroad company. Such a holding would, of course, forbid all such sales. If old age and incapacity came before the survey, the settler could not dispose of his holdings, or let any one into possession. By the very act of his attempted disposition the railroad right attaches. This will not do.

As shown before, the transfer of the right of possession, acquired by settlement, is sanctioned by the repeated adjudications of this court, though, of

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course, the transferee cannot hold the land unless he is a qualified entryman and intends *bona fide* to file upon it as a homestead.

The same considerations forbid the belief that in the act in question a rule of evidence was established that accomplishes the same result as an express provision so extending the grant.

Finally the inadmissibility of this arbitrary rule of evidence is apparent if we conceive of an action brought by the Northern Pacific Railway Company against Lammlein, at any time between 1882 and 1889, to enjoin the latter from cutting timber from the land in question with which to construct a house or barn, or for the purpose of clearing it with a view to its cultivation. Certainly Lammlein could have shown in that action that the tract in question was excepted and he could show the facts which brought it within the exception. The company would have been defeated because it would appear that it had no inceptive title to the land. But if it had no title in 1886, say, it had none at any later date.

It is unnecessary to comment on the authorities cited at pages 8 and 9 of appellants' brief to support the claim that the "good faith" of a homestead claimant can be shown only by a land office record.

There is nothing in any of them that even remotely refers to the subject of "good faith." They are all such cases as might have been cited by the appellant in the Nelson case to the effect that the

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land is not burdened with any kind of a claim at all,—so as to except it from the grant, as was claimed therein. They may have some relevancy to such a claim, but they are wholly inapplicable to a discussion as to how “good faith” on the part of a homestead occupant may be shown.

Nor is there anything in the remark quoted from the opinion of this court in

*United States v. C. M. & St. P. Ry. Co.,*  
(Adv. Sheets U. S. S. C. Dec. 15, 1910,  
page 7)

that gives any support whatever to such supposed rule of evidence.

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The controversy between the parties is brought out clearly by the remark made in the brief in connection with the reference to the act of May 14, 1880, at pages 10 and 11. There we read:

“That act simply gave to the homesteader the same period of grace previously enjoyed by the pre-emptor within which to make his entry; and indisputably if such an entry had been made by Lammlein or by his heirs within three months after the plat of survey was filed, *the railroad company would have lost its right to the land.*”

The appellee maintains that the railroad company could *lose* no right to the land, for it never had any. It never had any by reason of the conditions that existed in 1882. It either, on filing the map of definite location, acquired a perfect and indefeasible



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title or it got none at all. The language used implies that it got some kind of a title, likely to be terminated upon a condition subsequent. The whole course of the decisions construing these grants is against any such contention, and it is equally at variance with the whole argument of the brief preceding,—which is to the effect that the equitable title was acquired or was not acquired by the railroad company, *ipso facto*, on the filing of the map of definite location, but that in a subsequent contest between it and a homesteader, the only evidence by which he could be permitted to establish his good faith and the *bona fide* character of his settlement would be his filing in the land office, which, as shown, would not contain even a recital of his settlement or occupancy prior thereto at any time, much less the good faith thereof.

No such force can be given to the decision in

*Water & Min. Co. v. Bugbey*, 96 U. S. 165,

as is claimed for it. If it were “exactly in point” it would be flatly contradictory to the conclusion reached in

*Kansas P. Ry. Co. v. Dunmeyer*, 113 U. S. 629.

In fact it was appealed to in the last mentioned case, and the governing feature of it shown so clearly that no room was left for mistaking what it decided. The grant of Sections 16 and 36 to the

State of California for school purposes was made by the act of 1853, but, of course, the title of the government was not divested until the sections were identified by the survey. A clause in the act making the grant, excepted lands on which there was "any settlement by the erection of a dwelling-house, or the cultivation of any portion." One Bugbey had made a settlement on a tract which became a part of a certain section sixteen when the survey was made May 19, 1866, and in less than a year thereafter, never having attempted to enter the lands as a part of the public lands of the United States, never having "sought to establish any right by reason of this settlement . . . under the general pre-emption law," and, so far as the record discloses, never having intended to do so, on the 22d day of April, 1867, he acknowledged the full title of the state to the land and purchased the place of it. A ditch company which had constructed a canal across the land claimed title by virtue of the act of July 29, 1866, granting to owners of ditches the right of way over the "public lands." The court held that inasmuch as Bugbey, though actually on the land, was asserting no right to it adverse to the state, was not claiming any right to the possession by virtue of any law of the United States, was not a *bona fide* settler intending to purchase from it, and shortly after the survey acknowledged the title of the state by buying from it, the land was not to be

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regarded as "public land" and so open to the operation against him and in favor of the ditch company, of the act of July 29, 1866, but that on May 19, 1866, it had become the property of the State of California. All this appears more clearly, perhaps, from the opinion in the *Dunmeyer* case than from the report of the *Bugbey* case itself. It affords no sort of justification for the claim made that if years after the filing of a map of definite location, when the surveys are made, a settler does not file, he is to be conclusively regarded as a trespasser from the beginning.

If the surveys had been made promptly after the year 1882, and *Lammlein* had then omitted to file, but on the contrary had bought from the railroad, and then a controversy had arisen between him, claiming under the railroad title, and a stranger claiming the land upon the ground that the railroad never acquired title by reason of his occupancy, and there was no evidence going to show that his occupancy was accompanied by a purpose to enter the land as a homestead, the case would be "exactly in point." As it is, it contributes little if anything to the solution of the question which confronts the court.

It was appealed to likewise in

*Whitney v. Taylor*, 158 U. S. 85,

in support of the proposition that lands occupied

by a pre-emption or homestead claimant at the time of the filing of the map of definite location passed to the railroad company under its grant, should the land afterwards be abandoned by the settler, but this court refused, in those cases, to subscribe to that doctrine, saying in *Whitney v. Taylor*:

“This contention was denied, the court holding that the condition of the title at the date of the definite location determined the question as to whether the land passed to the railroad company or not.”

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It has been insisted that in view of the construction given to the grant and the principles controlling in the decisions referred to, it is immaterial whether any relationship is traced between Lammlein and Trodick; that the lands continued public lands free from any claim upon them by the railroad company by reason of the conditions existing when its map of definite location was filed, and that upon the subsequent termination of the claim of Lammlein, they were open to the first *bona fide* settler who should occupy them, and to entry as other public lands.

And yet it may be important, perhaps, in this action in equity in which it is sought to divest the railroad company of an apparent title to which it has no right, that there never was a time since prior to the date when its grant became fixed that the

lands were in the possession of the railroad company,—never a time when they were not in the adverse occupancy of either the appellee or Lammlein, who reclaimed and improved them, appellee paying \$500 for the improvements placed upon them by Lammlein. The occupancy of the premises by the appellee and by Lammlein would have been notice to any intending purchaser of the land from the railroad company, either before or after patent, of their rights. It is a universally acknowledged principle of the law of notice that possession and occupancy of real property is as effectual as notice to purchasers as is any record.

*Mullins v. Butte H. Co.*, 25 Mont. 525.

There never was a time after the company might, under any circumstances, have asserted title to this land that any intending purchaser supposing the railroad company to have title, would not have been disabused of such view by taking the precaution which is imposed on every person contemplating purchasing land to inquire of the occupant, if there is one, by what title he holds.

Nor in the problem of the construction to be given to the grant ought any particular weight to be given to the argument evidently, from the opinions, adduced repeatedly before this court to support the contention of the railroad company that insecurity must attend titles under its grant unless it can be

determined from record evidence what tracts were and were not granted.

At every stage in the history of the litigation over this particular grant this argument has been made. It was urged with special insistence in the Barden case, and predictions of disaster should the court hold that no mineral lands were excepted from the grant save those known to be such at the time of the filing of the map of definite location by the company were freely made by counsel representing it. The communities affected do not seem to have suffered the catastrophe prophesied.

Equally groundless are the present prophecies of evil.

While any land within the limits of the grant remains unpatented it is eminently fitting that the land department should, on the suggestion of any one interested, listen to a contention that any particular tract was subject to a valid claim at the time of the filing of the map of definite location, and that, for that reason, the railroad company has no right to it. That was why the act provided for the issuance of patents,—namely, that the department might make such inquiries as it might in any manner be prompted to start, as to whether any particular tract within the place limits was, for any reason, excepted from the grant. This is the principle on which the Barden case was decided.

The brief of the appellants gives much too narrow a scope to that decision. It is true the court held that the land department was charged with the duty of inquiring as to whether any lands to which patent was sought by the railroad company were or were not *mineral in character*, and to issue or to withhold the patent accordingly as it determined; that, in consequence, the question of whether any specific lands were non-mineral and passed to the railroad company under its grant, or were mineral and did not pass, was left open until patent finally issued, up to which time mineral locations might lawfully be made and maintained. It is true the court held that the land department might thus inquire into the *physical character* of the ground. But why did it so hold? It was because of its more comprehensive conclusion that the land department was empowered and charged with the duty to inquire whether the lands sought to be patented were such as, by reason of the provisions of the act, the claimant was entitled to take.

The Northern Pacific Railroad Company was not entitled to take mineral lands under its grant. Hence the land department was called upon to inquire, on its application for patent to any specific tract, whether the land was of that character. It was likewise denied the right to take, under the act, any lands which were subject to "pre-emption or other claims or rights" or that were "occupied

by homestead settlers" at the time the line of the road was definitely fixed.

Why should that not equally be made the subject of inquiry by the land department?

The principle of the decision is expressed in the following from the opinion:

"It is the established doctrine, expressed in numerous decisions of this court, that wherever Congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition or mistake, its determination is conclusive against collateral attack."

The quotations made by the court from its earlier decisions clearly elucidate the proposition that the scope of the inquiry imposed upon the land department is by no means confined to the "physical character" of the land. Thus, the following from

*Steel v. St. Louis Smelt. & Ref. Co.*, 106 U. S. 450:

"Necessarily, therefore, it must consider and pass upon the qualification of the applicant, the acts he has performed to secure the title, the nature of the land, and *whether it is of the class which is open to sale.*"

And then the court continues, as though it were not open to disputation, that it must make the very inquiry contemplated here:



"If the Land Department must decide what lands shall not be patented *because reserved, sold, granted, or otherwise appropriated, or because not free from pre-emption or other claims* or right at the time the line of the road is definitely fixed, it must also decide whether lands are excepted because they are mineral lands."

Such a hearing seems to have been ordered in respect to this particular tract before the patent issued to the railroad company, but on the coming in of the testimony it was ruled by the Commissioner, as a matter of law, that the title passed to the railroad company on the filing of the map of definite location, because there was no claim of record in the land office, following what was supposed to have been ruled in the Colburn case.

The railroad company certainly ought not to be heard to complain if when it applies for patent, the land office calls for information as to whether the land was occupied by a *bona fide* homesteader or was subject to any other claim at the time of filing the map of definite location, or to the refusal of the department to issue it a patent for the land if it is determined that it was so subject.

A purchaser of the land from the railroad company before the patent issues ought not to be heard to object, because he knows that under the law the apparent title is subject to be defeated by evidence on the application for the patent that the railroad company has, in fact, no title to the land.

There is no hardship at all on the railroad company in this, and there is no more uncertainty in any title derived from the railroad company before patent issues than there is in a title derived from any other claimant of land to whom patent has not issued. Every purchaser in that position takes the chance that patent may never issue.

*Hawley v. Diller*, 178 U. S. 476.

The government may at any time start an inquiry that may result in the conclusion that the party who seems entitled to a patent has no real claim to the land at all.

When the patent does issue, it is subject to attack only by some one who before it issued put himself in a position before the land office to demand and require that it go to him instead. The equity action cannot be maintained by any other.

It is true that it may be a long time before the company gets patent for any particular lands. The surveyors may be delayed and the congestion of work in the land office may result in delays thereafter. The necessary inquiry as to whether the land is mineral in character may be deferred from time to time by reason of the want of appropriations to carry on the work of inspection. All these things may be true. But they are equally true with reference to applications for patent under any act of Congress. The writer located some public lands under the lien provisions of the

forest reserve act, over ten years ago, and no patent for them has yet issued. That act necessitates an inquiry by the department as to whether the lands claimed are "vacant."

*2 Comp. Stat. 1541.*

Why should there be a rule by which the certainty of title in the railroad company under its grant should be fixed at some time anterior to the issuance of the patent, while in the case of any other law for the disposition of the public domain the right of the claimant remains open to inquiry until the patent issues? Really, the right of the railroad company does remain open, as ruled in the Barden case, until patent, so far as that right depends upon the character of the land. What the appellants really contend for is that its title remains open so far as the character of the tract is concerned with reference to its being mineral or otherwise until the patent issues, but that its character as to whether it was or was not subject to pre-emption or other rights or occupied by homestead settlers ought to be determined at some earlier time.

The Colburn case affords no warrant for the contention that such a distinction does exist or ought to exist. Whether the land is surveyed or unsurveyed, the question of whether it is reserved or is not reserved for any reason, is open until the issuance of the patent. That case simply holds that

in the case of a tract of land that had been surveyed, prior to the filing of the map of definite location, but which, though occupied, had never been filed on by the occupant, the land department would err, as a matter of law, in holding the land subject to a valid claim at the time of the filing of the map.

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The grant to the Northern Pacific Railroad Company was of a vast domain. The plainest principles of justice demanded that it should not absorb the modest holdings and improvements of those who had gone on the frontier to tame its wildness in advance of the coming of the railroad road.

Congress was determined that it should not have, as it seeks to appropriate by its patent, the fruits of the labor and expenditures of Lammlein in subduing this land. It was recognized that when surveys are delayed many years, as they were in this case, pre-emptioners and homesteaders frequently relinquish their possessions and improvements to later comers, effecting a sale, for all practical purposes, as though they had title. There was good sound reason for not providing by the act that in the event that land should be claimed at the time of the filing of the map of definite location and so excepted from the grant, yet if for any reason the right of the occupying claimant

should thereafter be terminated before patent, the land should become subject to the grant. Congress recognized that the settler had probably done as much in his way towards the development of the country as the railroad was to do, and it did not propose to put an embargo on his disposing of his possessions and his improvements should old age overtake him before the survey was made or other necessity, or even his interest prompted him to sell.

It got a great grant, as stated. It was not intended that it should reap what others had sown. It became necessary to except in general terms lands subject to claims or rights. Certain embarrassments to the railroad company necessarily ensued by reason of the exception—the embarrassment of being met when it applied for patent by proof, any legitimate proof, that any particular tract was excepted from the grant.

Before it got its patent in this case the appellee caused the proper inquiry to be made, with the result stated.

He could only bide his time, maintaining his possession of the land until patent issued and then appeal to the courts. This he did.

## II.

### ALLEGED INSUFFICIENCY OF BILL.

It is urged, however, that the decree is erroneous because there is no proof that appellee is not the

owner of one hundred sixty acres of land. No reference is made to any part of the record showing that such alleged defect in the proof was presented when the omission might have been supplied. There appears to be no question about the fact. The Commissioner rejected appellee's application on no such ground. Presumably his filing papers were in due form. The appellants made no answer that appellee was not entitled to the land because he was already the owner of one hundred and sixty acres of land, or because he was such at the time he applied to enter, or that his application was rightly rejected for that reason.

The record being altogether silent upon the subject, it becomes a question as to whether non-ownership of 160 acres of land must be pleaded and proved by appellee or whether the appellants must aver such a condition in order to defeat the action.

By well established rules of pleading it was not incumbent on the appellee to plead this negative.

Section 2289 of the Revised Statutes, as amended by the Act of 1891, reads as follows:

"Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one-quarter section, or a less quantity, of unappropriated public lands, to be located in a body in conformity to the legal subdivisions of the public lands; but no person who is the

proprietor of more than one hundred and sixty acres of land in any State or Territory, shall acquire any right under the homestead law. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres."

It will be observed that the qualifications of a homesteader are set out in the earlier part of the section, and then a proviso is inserted denying to any one the right to enter a homestead who is the owner of more than 160 acres of land in any state or territory.

The question as to when one pleading rights under a statute must negative the existence of conditions expressed in a proviso under which the right can not be asserted has been often considered. It has usually presented itself in connection with criminal statutes, but the principles are equally applicable in civil actions asserting rights founded on statutes.

*United States v. Cook*, 17 Wall. 168,

is a leading case.

In that case Mr. Justice Clifford, speaking for the court, says:

"Where the exception itself is incorporated in the general clause, as is supposed in the alternative rule there laid down, then it is correct to say, whether speaking of a statute or private contract, that unless the exception

in the general clause is negatived in pleading the clause, no offense, or no cause of action, will appear in the indictment or declaration when compared with the statute or contract; but when the exception or proviso is in a subsequent substantive clause, the case contemplated in the enacting or general clause may be fully stated without negating the exception or proviso, as a *prima facie* case is stated, and it is for the party for whom matter of excuse is furnished by the statute or contract to bring it forward in his defense.

"Commentators and judges have sometimes been led into error by supposing that the words, 'enacting clause,' as frequently employed, mean the section of the statute defining the offense, as contradistinguished from a subsequent section in the same statute, which is a misapprehension of the term, as the only real question in the case is, whether the exception is so incorporated with the substance of the clause defining the offense as to constitute a material part of the description of the acts, omission, or other ingredients which constitute the offense. Such an offense must be accurately and clearly described, and if the exception is so incorporated with the clause describing the offense that it becomes in fact a part of the description, then it cannot be omitted in the pleading; but if it is not so incorporated with the clause defining the offense as to become a material part of the definition of the offense, then it is matter of defense and must be shown by the other party, though it be in the same section or even in the succeeding sentence. 2 Lead. Cr. Cas., 2d Ed., 12; Vavasour v. Ormrod, 9 Dowl. & Ryl., 599; Spiers v. Parker, 1 T. R., 141; Com. v. Bean, 14 Gray, 53; 1 Stark. Cr. Pl., 246.

"Few better guides upon the general subject can be found than the one given at a very early period, by Treby, Ch. J., in Jones v. Axen, 1 Ld. Raym., 120, in which he said, the difference is, that where an exception is incorporated in the body of the clause, he who



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pleads the clause ought also to plead the exception; but when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause and leave it to the adversary to show the proviso; which is substantially the same rule in both its branches as that given at a much more recent period in the case of *Steel v. Smith*, which received the unanimous concurrence of the judges of the court by which it was promulgated."

The entire applicability of this language to the solution of the problem before us will be apparent when Section 2290, R. S. U. S., as amended by the act of 1891, is considered. The preceding section having defined the homestead right, this one sets out the contents of the affidavit which the applicant must file to assert the right.

He must make affidavit of his qualification to enter, reciting the facts as required by Section 2289, but not a word is said in the affidavit required, the substance of which in detail is set out, about his not owning more than 160 acres of land in any state or territory.

The principles announced in *United States vs. Cook* were applied in a civil action in

*Miller v. Shields*, 8 L. R. A. 406,

in the opinion in which numerous cases are referred to showing the generality of its application.

The Court of Appeals of the State of New York was guided by the same rule of pleading in an

action brought to recover of certain stockholders of a corporation a liability imposed upon them by statute.

The case of

*Rowell v. Janrrin*, 151 N. Y. 60,

is particularly pertinent because the exception or proviso came into the statute by amendment.

The works on pleading in civil cases announce the rule substantially as declared by the Supreme Court in the case of *U. S. vs. Cook*.

*Bliss on Code Pleading*, (3d Ed.) 202.  
*Shipman's Common Law Pleading*, 229.

Many other conditions besides the appellee's land wealth, if he were so encumbered, would operate to deny to him the right to make a homestead entry. If he had ever made a filing before he could not make a valid new one unless his right was restored.

In view of the provisions of Section 2290, he would not be entitled to the land if he had made any agreement to transfer it or if he intended it should be for the benefit of some one other than himself.

Under another provision of the statute—the Act of August 30, 1890—no single individual is entitled to enter more than three hundred and twenty acres of public land in the aggregate.

If the appellee had, prior to the time he applied

to enter the land in question and after 1890, acquired three hundred and twenty acres of public land under the desert land act, he could not make a valid homestead filing.

But it surely can not be maintained that he must negative in his bill the existence of all possible conditions under which, if existing, he would be denied a homestead entry. If such a state of facts existed, the appellants should have pleaded and proved it.

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However, if the court should regard the omission of the negative averment important, final decree ought not to be awarded against the appellee. The order should accord him the opportunity to amend the bill so as to obviate the defect. The learned judge who presided at the trial filed an opinion, which is found in the record at page 531.

It will be seen that he denied the relief asked on no such technical ground. If his attention was ever called to the matter at all, which seems improbable, it is quite evident that he attached no importance to it. If the averment in an amended bill should be traversed, the testimony would be confined to the issue thus made.

Though no decree can stand which is supported only by a vitally defective bill, yet it is not at all uncommon for an appellate court, when the merits of a case appear to be with a complainant

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whose bill has been dismissed, to reverse the decree with directions to permit an amendment. Such a disposition was made of

*Ruby v. Atkinson*, 71 Fed. 567.

The subject was considered and the practice vindicated in

*Erans v. Hughes*, 54 N. W. 1049.

The opinion refers to many cases in which it was pursued. Most of these, perhaps, were appeals from orders sustaining demurrers, but judgment had been entered in the case of

*Rigg v. Parsons*, 2 S. E. 81.

In that case the court said:

"If nothing else appeared in the judgment and order of the court below, we would, notwithstanding the fact that its ruling was not erroneous in sustaining the demurrer, reverse the judgment, and remand the case, with leave to the plaintiff to amend his declaration if he elects to do so, since we can plainly see that it could be amended so as to avoid this ground of demurrer. *Baylor v. Baltimore & O. R. Co.*, 9 W. Va. 270; *Norris v. Leuen*, 28 W. Va. 336."

But the usual course was departed from because it appeared that the plaintiff had declined to amend. But even in such a case the judgment was reversed with leave to amend in

*Dist. of Columbia v. Ball*, 22 App. D. C. 543.

This court has repeatedly acted in accordance

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with the procedure which it is insisted should be observed if the bill is believed to be defective, as is shown by the opinion in

*Van Doren v. Penn. R. Co.*, 93 Fed. 260.

In

*Scruggs v. Endom*, 123 La. 887,

the plaintiff was defeated because his testimony was excluded on an objection to the petition. The appellate court held that the objections urged were well taken, but refused notwithstanding to affirm the judgment and reversed it with directions to permit an amendment.

“If possible, the court must not allow justice to be defeated and wrong to triumph, by a mere mistake or unskillfulness in pleading. A court of equity must always aim to act upon broad principles of justice, disentangled as much as possible from little technicalities.”

*Ogden v. Thornton*, 30 N. J. Eq. 569-572.

“Even appellate tribunals will reverse an order or decree and send a cause back to the court having original jurisdiction, in order that an amendment may be made, so that the real merits of the controversy may be settled. *Kuhl v. Martin*, 2 Stew. 586; *Walker v. Armstrong*, 8 DeG. M. & G. 534; *Lewis v. Darling*, 16 How. 6; *Lum v. Winn*, 4 Desauss. 6.”

*Id.* 573.

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In equity the appellants have no just claim to

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this land. It is gratifying to know that the law does not award it to them.

Respectfully submitted,

WALSH & NOLAN,  
Solicitors for Appellee.

THOMAS J. WALSH,  
Counsel for Appellee.

*8 Mont. 485.  
100 Pac. 960.*

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IN THE  
**Supreme Court**  
OF THE  
**State of Montana.**

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WINIFRED DILLON, MARY E. DILLON, JOHN  
H. DILLON and THOMAS DILLON, Jr.,  
Minors, BY THEIR GUARDIAN, WINIFRED  
DILLON,

Respondents,

vs.

GREAT NORTHERN RAILWAY COMPANY, A  
CORPORATION,

Appellant.

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BRIEF OF APPELLANT.

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STATEMENT OF CASE.

For some time prior to the 25th day of September, 1906, and on that day, Thomas Dillon (the then husband of the plaintiff, Winifred Dillon, and the father of the other plaintiffs) was employed by the Great Northern Railway Company as an assistant roadmaster (Tr. 15). "The duties of said Thomas Dillon, as

assistant roadmaster of the defendant, consisted exclusively and solely of the supervision, repair and construction of the roadbed, rails and ties and bridges of the defendant Railway Company, and were not, to any extent, connected with the moving or operation of cars, engines, trains or any part thereof." (Tr. 17).

On said 20th day of September, 1906, the said assistant roadmaster, in going eastward, over defendant's line of railway, to the station of Cut Bank, "was properly riding in a certain freight train of the defendant Railway Company and in the caboose car of said train; said caboose car constituted part of an interstate train, and the defendant Railway Company was then, by and through its other agents and employees, engaged in the operation of said interstate and intrastate train and the transportation, by it, of interstate and intrastate freight contained in and on the cars constituting said train." (Tr. 15 and 16).

On the said 20th day of September, 1906, the defendant Railway Company was also, by and through its other agents, and employees, engaged in the operation of another interstate and intrastate freight train eastwardly from the town and station of Whitefish to the said station of Cut Bank, said second train being in the rear of, and following, the train whereon said assistant roadmaster was riding. (Tr. 2 and 16).

On the said 20th day of September, 1906, "the said two interstate and intrastate freight trains, of said de-



fendant Railway Company, collided, and, by reason of said collision, the said Thomas Dillon was instantaneously and immediately killed and did not live or survive for a second of time after said accident." (Tr. 16).

"Said collision, and the resultant instantaneous killing of the said Thomas Dillon, was due to the negligence and carelessness of employes of said defendant Railway Company who were fellow servants of the said Thomas Dillon." (Tr. 16).

"Said collision was caused by the disobedience, and violation, by said employes, of the rules of said defendant Railway Company, and of the terms and conditions of properly issued orders of said Railway Company, which had been previously and properly given to each of said employes." (Tr. 16).

"Said collision, resulting in the instantaneous killing of said Thomas Dillon, was not, in any manner or to any extent whatever, due to the negligence of the said Thomas Dillon or of said defendant Railway Company, nor was said collision, or the killing of said Thomas Dillon, caused by any defect or insufficiency, due to defendant's negligence, in the cars, engines, appliances, machinery, track, roadbed, ways or works of said defendant Railway Company." (Tr. 16 and 17).

At the time of Dillon's death he was thirty-five years of age and, prior thereto, had been in robust health, was competent for the position he held, and was earn-

ing at the rate of one hundred and ten dollars per month; the plaintiffs are his only heirs at law and, at the time of his death, the plaintiff, Winifred Dillon (his widow), was thirty-one years of age, and the other plaintiffs (his and her minor children), Mary E., John H., and Thomas Dillon, Jr., were nine years, eight years, and seven months of age, respectively. (Tr. 17).

This action was instituted by the widow, in her own behalf and as guardian of the minor children, for the recovery of forty thousand dollars as damages by reason of the alleged wrongful death of the deceased caused by the negligence of defendant's employees, who were fellow servants of the deceased, for whose negligence plaintiffs claimed that defendant is liable.

After issues had been joined by the filing of defendant's duly verified Answer and plaintiffs' Reply thereto, the plaintiffs and defendant submitted the case to the Court, pursuant to the provisions of Section 1117 of the Montana Code of Civil Procedure, upon an agreed statement of facts, each of said parties waiving the right to introduce any testimony, or other proof, in said action, and submitted the case solely upon the facts set forth in the agreed statement. (Tr. 14).

Judgment was thereafter duly entered, by the Court, on the 29th of June, 1908, in favor of the plaintiffs and against the defendant, for the sum of Eleven Thousand Dollars, with interest from that date, at the rate of 8

ing at the rate of one hundred and ten dollars per month; the plaintiffs are his only heirs at law and, at the time of his death, the plaintiff, Winifred Dillon (his widow), was thirty-one years of age, and the other plaintiffs (his and her minor children), Mary E., John H., and Thomas Dillon, Jr., were nine years, eight years, and seven months of age, respectively. (Tr. 17).

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per cent per annum until paid, and costs amounting to Ten Dollars and Ninety Cents. (Tr. 11).

From that judgment this appeal has been taken.

#### SPECIFICATION OF ERRORS.

1. The Court erred in adjudging that upon the facts set forth in the agreed statement plaintiffs are entitled to recover damages from the defendant.

2. The Court erred in ordering that judgment be entered in favor of the plaintiffs for a specified amount as damages, with interest thereon, and costs.

#### BRIEF OF ARGUMENT.

#### CONCISE STATEMENT OF ADMITTED FACTS.

1. The death of Thomas Dillon was caused by the collision of two of defendant's freight trains. (Tr. 16).

2. That collision was caused by the negligence of other employes of defendant. (Tr. 16).

3. The employes of defendant whose negligence caused the collision which resulted in Dillon's death were fellow servants of Dillon. (Tr. 16).

4. Neither Dillon nor the defendant was guilty of any negligence which, proximately or remotely, caused, or contributed to, the said collision or Dillon's resulting death. (Tr. 16).

5. Dillon's death was instantaneous and immediate

and he did not survive for a second of time after the accident. (Tr. 16).

6. The two colliding freight trains were, at the time of the collision, engaged in the transportation of interstate and intrastate freight. (Tr. 15 and 16).

7. At the time of the collision Dillon was properly riding in the caboose car of one of the colliding trains; but his duties, as assistant roadmaster of defendant, were not to any extent connected with the moving or operation of trains or any part thereof. (Tr. 15 and 17).

#### APPELLANT'S POINTS.

1st. Defendant's entire freedom from negligence of any kind having been expressly admitted (Tr. 16), its liability, if any, to plaintiffs must arise out of, and depend upon, its supposed responsibility for the negligence of others.

2nd. The only other persons for whose negligence defendant could have been held responsible are its employes.

3rd. The record contains an express admission that those employes of defendant whose negligence caused the death of plaintiffs' decedent were fellow servants with the deceased.

4th. If defendant is responsible for results caused by the negligence of fellow servants of the deceased, such liability must have been created by Statute, as it

does not exist independently of express legislative enactment.

5th. Only two (2) such Statutes have been enacted by the Legislature of this State, to-wit, the Act approved March 5, 1903, and the Act approved January 16, 1905.

6th. The Act of 1903 confers no rights upon any person or persons excepting injured employees, as it expressly confines the statutory liability, thereby created, to liability "for all damages sustained by an employe."

7th. The Act of 1905 likewise only creates a liability "for all damages sustained by an employe," and confers no rights upon other persons except the right to prosecute a deceased employee's claim, if he ever had any, "for all damages sustained" by him.

8th. The survival Statute, constituting Section 587 of the Montana Code of Civil Procedure, also merely confers similar rights "in all cases where a cause of action or defence arose in favor of such party prior to his death."

9th. The admittedly instantaneous and immediate death of Dillon precludes the possibility of his having had any claim "for all damages sustained by an employe."

10th. As Dillon never had any cause of action, none could, or did, survive to others under any Montana Statute.

11th. The death of Dillon having been admittedly caused by the negligence of fellow servants, and there being no possible statutory liability to him, or through him to his survivors, the common law defence precludes recovery.

12th. The cause of action, for wrongful death, supposed to be conferred by Section 579 of the Code of Civil Procedure of Montana, is not for injuries to the employe, but for wrongs to his family, and is their cause of action; but this right of action is subject to the common law defence when the wrongful death is caused by the negligence of fellow servants of the deceased.

#### FURTHER POINTS RELIED UPON BY APPELLANT.

a. The Montana Act of 1903 was repealed by the later Act of 1905.

b. The Montana Act of 1905 was borrowed from the legislation of the State of Iowa and its first section is identical with Section 1307 (now 2071) of the Iowa Code.

c. The Act of 1905, as interpreted by the Supreme Court of Iowa, only creates a liability in favor of employes whose duties are connected with the use and operation of a railroad, and then only when the negligent employe is also of the same class.

d. The Act of 1905, even when the injured employe



and the negligent employe both have duties connected with the use and operation of a railroad, only creates liability for damages sustained "in consequence of the neglect of any other employe, OR by the mismanagement of any other employe, AND in consequence of the wilful wrongs of any other employe."

e. It is admitted that the duties of an assistant roadmaster "were not, to any extent, connected with the moving or operation of cars, engines, trains, or any part thereof," and, while it is admitted that Dillon's death was "in consequence of the neglect" of other employes, it is not even claimed that it was caused by such neglect "and in consequence of the WILFUL WRONGS of any other employe."

### THE FEDERAL QUESTION.

The United States Congress having by the Act approved June 11, 1906, assumed its exclusive constitutional control of the subject of employers' liabilities to employes, in so far as it relates to interstate commerce, the Montana Act of 1905 was thereby superseded as to such commerce, and as to all employes engaged or employed in such commerce; and, as the colliding freight trains are admitted to have been engaged in the transportation of interstate freight, AND the negligent employes to have been engaged in the operation of such interstate trains, at the time of the

accident (Tr. 15 and 16), no liability can arise out of any State legislation on this subject.

### ARGUMENT AND AUTHORITIES.

The sundry points hereinbefore stated may be condensed and grouped as three main subjects for discussion.

1st. The Act of 1903 with the survival Statute constituting Section 587 of the Code of Civil Procedure.

2nd. The Act of 1905.

3rd. Effect of the Act of Congress approved June 11, 1906.

### ACT OF 1903 AND SECTION 587 OF CODE OF CIVIL PROCEDURE.

This Act of 1903 purports to determine and declare what employes shall be vice principals and therefore only specifies a few classes of employes as those for whose negligence the employer shall be liable; as the Act of 1905 is of broader scope, seeks to make the employer liable for the negligence of ALL employes connected with the use and operation of the road, and includes the entire subject covered by the earlier Act, it would seem quite clear that the later legislation supersedes and repeals the former, and hence none of the provisions of the repealed law require construction or discussion.

Territory ex rel. Largey vs. Gilbert, 1 Mont. 371.

If, however, the Court should consider that the Act of 1903 still has legislative force, its limited operation must be conceded, as it makes no provision whatever for any survival of the liability created by it and only treats of damages sustained by employes themselves.

The co-existing general provision of the Code as to the survival of causes of action is likewise too plain to justify dispute as to its proper interpretation. This legislation is expressly confined to the prevention of abatement of causes of action by the death of any one having at the time of his death a cause of action against another. It declares that such a cause of action shall survive and be maintained by the representatives or successors in interest of the deceased "in all cases where a cause of action or defence, arose in favor of such party prior to his death." Independently of adjudged cases, or other authorities, the meaning of this Statute is clear and it can hardly be so distorted as to be susceptible of any construction by which a cause of action which did not arise before death (and therefore did not arise at all) survives in favor of the successors in interest of the deceased. The language of the Statute is too clear for construction at all, and it has no application whatever outside the scope of its own well-defined limits. If anyone dies after a cause of action has arisen in his favor, his successors in interest may prosecute that cause of action, but if a cause of action has not so

arisen, manifestly there is nothing to abate or survive and the Statute can not, and does not, operate under any such conditions.

The Court will not misunderstand appellant as contending that the heirs or personal representatives of the deceased have no cause of action if the death was caused by the wrongful act or neglect of others; but appellant insists that this cause of action (that of the heirs) is given TO THE HEIRS by another Statute, and THEIR cause of action never arose in favor of the deceased and hence can not either abate or survive. This particular Statute of 1903 has no application to such conditions; the cause of action for wrongful death is a statutory one, but it is not created by THIS Statute. The cause of action for wrongful death is given to the heirs themselves by reason of the wrong done TO THEM; it is THEIR cause of action and is not one that they acquire from the deceased by survival or otherwise.

The widow and children of Thomas Dillon, deceased, are not seeking in this action, to assert a cause of action conferred upon them by the wrongful death Statute, constituting Section 579 of the Montana Code of Civil Procedure; if they were thus seeking to assert that statutory cause of action, expressly given to THEM by statute, the admitted fact that the death of Dillon was caused by fellow servants would constitute a complete legal defense. But they are not now at-

tempting to assert THEIR statutory cause of action; they are endeavoring to assert HIS cause of action under a Statute that is supposed to destroy the defence resting upon the common law fellow servant doctrine. Manifestly they can not succeed to, or enforce, any cause of action given to him, by the Statute of 1903, unless the survival section (587) of the Code of Civil Procedure confers such a right upon them, for the Act of 1903 does not attempt to create any survivorship rights; and, as this survival section (587) is expressly limited to "cases where a cause of action arose in favor of such party prior to his death," it requires no extended discussion to demonstrate the legal impossibility of finding any foundation whatever in these statutory provisions for liability to survivors of a decedent when no cause of action ever "arose in favor of such party prior to his death."

Manifestly, therefore, even if the Act of 1903 can be considered as still in force, and even if the omission of any survival provisions from it is supplied by the co-existing statutory provisions found in Section 587 of the Code of Civil Procedure, the plaintiffs (now respondents) have not the right to prosecute any cause of action which the Act of 1903 created in favor of Thomas Dillon, nor have they succeeded to any such cause of action under the survival provisions of the Code. The parties to this action have deliberately and solemnly admitted that "the said Thomas Dillon was

instantaneously and immediately killed and did not live or survive for a second of time after said accident." (Tr. 16). No argument is required in support of the indisputable statement of fact that one who is instantaneously killed and, who has not survived for an instant, never had a cause of action against any one arising out of the fatal accident, nor could he have one which "arose in favor of such party prior to his death."

Some confusion has resulted from a failure to distinguish clearly, in a few cases, between Statutes which create a cause of action in favor of the family, or heirs, of the deceased, by reason of the wrong to THEM, and the damage suffered by THEM, as the result of the negligent and wrongful killing of the deceased, and the vitally different Statutes which do not create any right of action, or cause of action, in favor of the family or heirs of the deceased, but (like this Montana Act of 1903) only create a liability to the EMPLOYEE himself and then further provide (like the Montana Code Section 587) that if the employee's statutory cause of action is acquired by him and he SUBSEQUENTLY dies, his heirs (having no cause of action themselves under such a Statute) shall succeed to (and prosecute in their own behalf) this statutory cause of action previously fully matured under the Statute and held by the ancestor at the time of his death.

But wherever this distinction is made, and wherever

the legislation is similar to that of Montana, the authorities abundantly sustain the irresistible logic of the contention that instantaneous death prevents the birth of the deceased's statutory cause of action and hence also prevents the possibility of survivorship.

The Supreme Court of the United States adopts and announces this doctrine in the following concise but forceful terms:

"It is true that the seventh paragraph alleges that from the time the tug struck the bank of the river to the time it sunk (about 10 minutes) and the said Ella Barton was drowned, she, the said Ella Barton, suffered great mental and physical pains and shock, and endured the tortures and agonies of death. But there is no averment from which we can gather that these pains and sufferings were not substantially contemporaneous with her death and inseparable, as a matter of law, from it. *Kearney vs. Railroad Co.*, 9 Cush. 108, *Hollenbeck vs. Railroad Co.*, 9 Cush. 478, *Kennedy vs. Sugar Refinery*, 125 Mass. 90, *Moran vs. Hallings*, 125 Mass. 93. Had she suffered bodily wounds and bruises, from the result of which she lingered, and ultimately died, it is possible that her sufferings during her illness would give a separate cause of action; but the very fact that she died by drowning indicates that her sufferings must have been brief, and, in law, a mere incident to her death. Her fright for a few minutes is too unsubstantial a basis for a separate estima-

tion of damages." *Barton vs. Brown (The Corsair)*, 145 U. S. 335, 12 S. C. Rep. 949.

It will be observed that the Court guesses at the possibility of the dying struggles lasting a few minutes and estimates the period of time elapsing between the striking of the tug against the river bank and the subsequent death from drowning as "about 10 minutes," whereas in the case at Bar the parties admit, assert and agree that Dillon "did not live or survive for a second of time after said accident."

#### THE ACT OF 1905.

##### SURVIVAL OF RIGHT OF ACTION.

This Statute, like the earlier Act of 1903, specifically limits the liability created by it to "damages sustained BY ANY EMPLOYEE," and, in further imitation of the former Statute, utterly fails to create any liability whatever for damages sustained by relatives or heirs of an employe whether such damage results from the negligent killing (or wrongful death) of the employe or otherwise.

The Legislature, in enacting this Statute in lieu of the Act of 1903, evidently overlooked the provisions of Section 587 of the Code of Civil Procedure (the abatement and survival statute) and hence unnecessarily provided, by Section 2, that "in case of the death of any SUCH employe in consequence of any injury or damage SO SUSTAINED, THE right of action shall



survive and may be prosecuted and maintained by his heirs or personal representatives." This section, of course, does not create any liability in favor of any one, but merely designates the persons, or classes of persons, who may prosecute and maintain a cause of action created by the first section; this being true, manifestly the provisions of the second section can have no legislative, or operative, force under any conditions which fail to disclose the existence of a cause of action created by the provisions of the first section. Whenever, therefore, a railroad employer is not shown to have been liable to an employe "for damages" sustained by (him) any employe," "the right of action" (sought to be created by the first, and referred to in the second, section) can not survive or "be prosecuted and maintained" by any one under the second section. "The right of action" must first arise under the first section before it can possibly survive under the second section.

Unless the Record shows "damages sustained BY ANY EMPLOYE," for which the first section makes the employing Railroad Company liable TO THE EMPLOYE, "the right of action" for "damage SO sustained," referred to in the second section, has never been created by the Statute and hence can not survive.

Here, again, it is important to bear in mind the difference between a cause of action CONFERRED UPON AN EMPLOYE by reason of DAMAGES SUS-

TAINED BY HIM, and the entirely different and distinct right of action created by other legislation in favor of the deceased employe's family or heirs by reason of DAMAGES SUSTAINED BY THEM because of his wrongful death.

We are not now discussing the latter, nor attempting to construe the Statute creating liability to heirs or personal representatives.

The case at Bar involves an action to enforce, on behalf of the heirs of the deceased railroad employe, a right of action claimed to have been created, by this Act of 1905, in favor of the deceased and which they insist has survived, under this Act, and may now be "prosecuted and maintained by his heirs." Appellant respectfully insists that no such cause of action has ever matured under the Statute because of the instantaneous death of the employe who "did not live or survive for a second of time after said accident" (Tr. 16), and hence no non-existent right of action could survive.

If, as is conceded, the employe did not survive the negligent act which constitutes the cause of action, how can that unborn cause of action survive? There was no negligence prior to his death and hence no damages sustained by HIM prior to death. The negligence complained of, and which constitutes the foundation of the alleged right of action, was not completed while he lived, and, therefore, while his heirs may have

a cause of action under another Statute, Dillon never had any cause or right of action; and, as appellant was never LIABLE TO HIM, UNDER THIS STATUTE "for a second of time," it can not be liable to plaintiffs UNDER THIS STATUTE. A right of action which he never had can not survive and be enforced by his heirs.

The authorities cited in support of these views, as to the Act of 1903, are, of course, equally applicable to the Statute now being discussed but the Court is also specially referred to the well-reasoned opinion of the Supreme Court of South Dakota in the case of Belding vs. Black Hills & Ft. P. R. Co., 53 N. W. 750.

#### ACT OF 1905.

#### HISTORY OF THE LAW.

The Legislature of the State of Iowa, by an Act approved April 8, 1862 (Laws of 1862 Ch. 169, Sec. 7, p. 198), enacted statutory provisions which were evidently intended to abolish the fellow servant doctrine as a defence in actions by any one for the recovery of damages for personal injuries. Section 7 of that Statute reads as follows:

"Sec. 7. Every railroad company shall be liable for all damages sustained by any person, including employes of the company, in consequence of any neglect of the agents or by any mismanagement of the engi-

neers, or other employes of the corporation, TO ANY PERSON SUSTAINING SUCH DAMAGE."

The provisions of this section were very broad as to the persons for whose negligence the company should be liable ("any mismanagement of the engineers OR OTHER EMPLOYES of the corporation"), and also as to the persons to whom the company should be liable ("by any person including employes of the company"), but the liability was only to the "person sustaining such damage," and hence, while much broader, in the respects mentioned than the Montana Act of 1903 the restriction of liability to the person damaged is the same. By reason of the very broad provisions determining for whom and to whom the company should be liable, the early decisions of the Supreme Court of that State may seem to be inconsistent with the later (and the latest) rulings by that Court, but any such seeming conflict will disappear upon carefully observing which Statute was being construed by the Court.

Later, in 1872, the Legislature of Iowa passed another Act fixing the liability of railroad companies, which was as follows:

"Section 1. That every corporation and person owning or operating a railroad in this State shall be liable for all damages sustained by any person in consequence of the wilful wrongs, whether of commission or omission, of their agents and employes, where such

wilful wrongs are in any manner connected with the use and operation of any railroad so owned or operated, on or about which they shall be employed." (Ch. 65 Laws 14 Assembly).

Subsequently this legislation was consolidated into the provisions of Section 1307 of the Iowa Code of 1873; that section (afterward continued as 2701 of the later Code of 1897 without change) reads as follows:

"Sec. 1307. Every corporation operating a railway shall be liable for all damages sustained by any person, including employes of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employes of the corporation, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers or other employes, when such wrongs are in any manner connected with the use and operation of any railway, on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."

The vital change introduced by this later Statute is the provision that the wrongs for which the Railway Company is to be liable are only those wrongs which are connected with, or result from, the use and operation of the railway on or about which the employes are employed. There is another change made by this Code provision, which will be mentioned later, but it is of less importance than the vital one just mentioned.

A comparison of this Section 1307 (now 2701) of the Iowa Code with the Montana Act of 1905 reveals the indisputable fact that the provisions of the Montana law were borrowed from, or enacted in imitation of, those of the Iowa Statute or Code, and hence, under the familiar rule of statutory construction, repeatedly approved by this Court, the Legislature of Montana adopted these provisions with the legal significance, and with the meaning, given to them by the Supreme Court of Iowa prior to the enactment of the Montana Statute. The Legislature is presumed to have intended, by these provisions, whatever the Supreme Court of the Parent State had declared them to mean.

#### THE ACT OF 1905.

#### ADOPTED IOWA CONSTRUCTION.

Referring to the earlier Act of 1862, the Supreme Court of Iowa says that "the Court, in order to uphold the constitutionality of the law in *Deppe vs. Railroad Co.*, 36 Iowa 52, limited the term 'employees' to those engaged in operating the railroad, saying, through Cole J., 'the manifest purpose of the Statute was to give its benefits to employees engaged in the hazardous business of operating railroads. When thus limited it is constitutional; when extended further it becomes unconstitutional. *Johnson vs. Railway Co.* (Minn.) 45 N. W. 156; *Railway Co. vs. Mackey*, 127 U. S. 205—

8 Sup. Ct. 1161; Railroad Co. vs. Pontius, 157 U. S. 209, 15 Sup. Ct. 585; Bucklew vs. Railway Co., 64 Iowa 603, 21 N. W. 103. The case was decided under the Act of 1862." Akeson vs. Chicago B. & Q. R. Co., 75 N. W. 677.

In the same case (Akeson vs. Chicago B. & Q. R. Co.), the Court defines the hazards of the railroad pursuit, which justify this classification and render the law constitutional, in the following terms: "The only dangers peculiar to railroading are those occasioned by the movement of the engines, cars and machinery on the track, or directly connected therewith. It is evident that the Statute contemplates such injuries only as are caused by the negligent acts of employes so engaged. In no other proper sense is a railroad used and operated. \* \* \* The peculiarity of the railroad business, which distinguishes it from any other, is the movement of vehicles or machinery of great weight on the track by steam or other power, and the dangers incident to such movement are those the Statute was intended to guard against."

It thus appears that, prior to the adoption of this legislation by the State of Montana, the Court of last resort in the Parent State held that the special protection afforded, by this Statute, to the particular class of employes benefited by it (railroad employes), is protection from those perils which are specially involved in that kind of employment; and the Court plainly de-

clares that it is only by the discovery of such a limited legislative purpose that the Statute could be recognized as a constitutional exercise of legislative power.

Manifestly, therefore, the Montana Statute must be declared to be similarly confined within these constitutional limits, and not to extend to railroad employees (merely because they are railroad employees) protection from perils which are not peculiar to this particular pursuit, but to which all other employees, and all other persons, may be exposed without being employed by a Railroad Company or employed at all.

Applying this established rule of construction, it would seem difficult to find justification for the theory that an Auditor in the Accounting Department of a Railway Company is within the protective principles of this legislation whenever he happens to be riding either on a passenger or freight train of the employing company. He may have some claim for compensation if injured and the Railway Company may be liable to him, but it will hardly be seriously contended that any such claim, or any such liability, can, or could constitutionally, be because of the provisions of such legislation as is now being considered.

The constitutional principle involved, and which endangered the validity of these Statutes, only justifies this special legislation, for the benefit of a particular class of persons, because of the extra hazardous nature of THEIR employment and the peculiar perils in-



volved in, and incident to, the proper performance of THEIR duties. Merely riding in a passenger coach, or in a caboose car, does not involve perils peculiar to the performance of the duties of any one except railroad trainmen and others engaged in similar pursuits. An Auditor, a clerk in the Tax Department, a draftsman in the Engineering Department, or any other employe of a Railroad Company whose duties are not extra-hazardous, do not, by merely entering a railroad car to be transported, come within the constitutional powers of the law-making body of the State, in the exercise of which class legislation of this kind may be lawfully enacted; THEY are not engaged in an extra-hazardous pursuit; THEY do not become exposed to any perils, while engaged in the discharge of their duties, which are not always equally shared with them by all other travelers.

This is equally true of an Assistant Roadmaster of a Railroad Company; he is not engaged in a perilous pursuit. He may be in danger when he is riding on a railroad train, just as he is when he is traveling in a stage coach, a buggy, a boat, a wagon or on horseback; but these dangers do not entitle such a class of employes to be protected by special or class legislation, and when the Legislature of Montana adopted this Statute, it declared, through the prior interpretations of the Statute, that it excepted, necessarily, and in conformity to constitutional limitations, from its protec-

tive provisions all assistant roadmasters and other employes whose duties do not involve these unusual perils peculiar to the operation of railroads; or, as the Supreme Court of Iowa expressed it, "the manifest purpose of the Statute was to give its benefits to EMPLOYEES ENGAGED IN THE HAZARDOUS BUSINESS OF OPERATING RAILROADS." (Deppe's case *supra*). "It has repeatedly been held that this Statute was intended for the protection and benefit of employes who, FROM THE VERY NATURE OF THEIR EMPLOYMENT, are exposed to the hazards peculiar to the business of using and operating a railroad." (Butler's case, 87 Iowa 206, 54 N. W. 208).

#### ACT OF 1905.

#### IOWA CONSTRUCTION CONTINUED.

At an early date after the constitutionality of this kind of class legislation had been established by the Supreme Court of Iowa by reason of the limited application and meaning of the laws as interpreted pursuant to the presumption that the Legislature did not intend to exceed constitutional limits, that Court was called upon to define the meaning, and declare the scope and effect of the Code provisions as thus interpreted, and, as early as 1886, the Court, whose constructions of this law are presumed to have been con-

sidered, approved and adopted by the Legislature of Montana, held that the liability created by this Statute requires two co-existing conditions to give it birth, viz.: there must be an employe injured who, at the time of the accident, was "engaged in the hazardous business of operating railroads," and this injury to such an employe must have been caused by the negligence of another employe who was, at that time, also employed and engaged in "the use and operation of a railroad."

In the case of *Stroble vs. Chicago M. & St. P. Ry. Co.* (31 N. W. 66), the Court declares this effect of the Statute, in no uncertain terms, as follows:

"This negligence, to render the corporation liable, must be OF AN EMPLOYEE, AND AFFECT A CO-EMPLOYEE, who are in some manner performing work for the purpose of moving a train, as loading or unloading it, superintending, directing, or aiding its movement. The persons must be connected in some manner with the moving of trains. Work preparatory thereto, which may be done away from a train, is not connected with its movement. The Statute, it will be observed, holds the corporation liable for the negligence of a co-employe which is in any manner connected with the use and operation of any railway. What is the use and operation of a railway? It is constructed for the sole purpose of the movement of trains. That is its sole purpose. What is the opera-

tion of a railway? They can be operated in no other way than by the movement of trains. See in support of these views *Foley vs. Chicago R. I. & P. Ry. Co.*, 64 Iowa, 644, 21 N. W. 124; *Malone vs. Burlington C. R. & N. Ry. Co.*, 65 Iowa 417, 21 N. W. 756."

In the earlier case of *Foley vs. Chicago R. I. & P. Ry. Co.*, supra, the Court, in considering the asserted liability of a Railroad Company, under the provisions of Section 1307 of the Code of 1873, to a car repairer who was injured by the negligence of his co-laborers in repairing a car on a track, used the following language quite pertinent to the case at Bar:

"The headquarters of the force of car repairers to which plaintiff belonged was at Des Moines. Plaintiff did no work in shops, but repaired cars on all of the tracks of the company in the yard at Des Moines. He also assisted in repairing cars at other stations along the road as far west as DeSoto, and as far east as Newton. Some weeks he went three or four days to other places than Des Moines and other weeks not more than one day. He was required to go wherever repairing was to be done; and sometimes the cars were repaired in the trains, and at other times they would be set off from trains for that purpose. When he went to stations away from Des Moines, he traveled sometimes on a freight and sometimes on a passenger train, and upon passes furnished to him by the foreman of the car repairers. If he traveled on a freight train, he rode

in the caboose. \* \* \* Applying this test to the evidence in the case at Bar, we think the plaintiff does not come within any rule which has been adopted by this Court. It is true, he was at times required to take passage upon the caboose of a freight train, or in the coach of a passenger train, to ride to his work, but he was not required to engage in his employment at points where there were moving trains. It was held in Deppe's case that 'if the plaintiff had been employed exclusively in shoveling or loading the dirt, he could not recover, although he might have rode to and from his work on the cars.' That is about as near as plaintiff in this case brings himself by his evidence to the perils attending the operation of the road. RIDING TO AND FROM HIS WORK, when required to go to points away from Des Moines, IS ABOUT ALL THE DANGER TO WHICH HE WAS EXPOSED FROM THE OPERATION OF THE ROAD. He was not a train-man and had nothing to do with the running of trains."

In the other earlier case, cited by the Court, of Malone vs. Burlington C. R. & N. Ry. Co., the Court explains the vital difference between the very general provisions of the old Act of 1862 and the much more restricted scope of the section (1307) of the Code, and then definitely and distinctly fixes the conditions precedent to any liability under the Code. The Court says:

"But the subsequent legislation has established a new rule as to the class of acts for which the companies are liable. So that to entitle an employe now to recover against the company for injuries which he has sustained in consequence of the negligence or mismanagement or wilfulness of a co-employe, he must show (1) that he belonged to the class of employes to whom the Statute affords a remedy; and (2) that the act which occasioned the injury was of the class of acts for which a remedy is given. We think it very clear that the plaintiff has failed to establish the latter fact."

In the case, hereinbefore referred to, of *Akeson vs. Chicago B. & Q. Ry. Co.* (75 N. W. 676), though the plaintiff, under the circumstances disclosed by the evidence, was held to be within the provisions of the Statute and entitled to recover, the Court again distinctly recognizes and announces the doctrine of the earlier cases, after reviewing the authorities, and declares the necessity for the co-existence of the two elements of liability, for which we contend, in the following words:

"If, then, the injury is received by an employe whose work exposes him to the hazards of moving trains, cars, engines or machinery on its track, AND is caused by the negligence of a co-employe in the actual movement thereof, or in any manner directly connected therewith, the Statute applies, and recovery may be had. Beyond this, the Statute affords no protection.

The purpose of the law-makers was evidently not to make men, because employed by railroad companies, favorites of the law, but to afford protection owing to the peculiar hazards of their situation."

This terse and vigorous statement of the object, purpose and legal effect of this Statute was made in 1898, seven years before the Montana Act of 1905 was adopted by the Legislature of this State and we respectfully insist that, under these circumstances, this prior judicial interpretation must be regarded as incorporated into the Act itself and as expressing the legal meaning of the provisions enacted by the Montana Legislature.

These authorities were again reviewed and affirmed, by the same Court, the next year (1899) in its opinion, upon rehearing, in the case of Reddington vs. Chicago, M. & St. P. Ry. Co. (78 N. W. 800), reversing its former ruling in the same case (75 N. W. 679); and as an evidence of the permanency of these rulings by the Supreme Court of Iowa, we may refer to the last case decided by that Court in 1906 (though one year after the enactment of the Montana law) in which the prior cases are referred to and finally affirmed with an intimation that further appeals involving such question will be useless.

In this case, last referred to, of Dunn vs. Chicago R. I. & P. Ry. Co. (107 N. W. 616), the Court says: "The Statute has been so many times construed ad-

versely to the appellant's contention that we deem the question no longer an open one in this State."

The only discord in the consistent rulings of the Court, if any, is found in the case of *Haden vs. S. C. & Pac. Ry. Co.*, 92 Iowa 226, 60 N. W. 537; but that case is disapproved in the case of *Connors vs. Chicago & N. W. Ry. Co.*, 82 N. W. 953, and that disapproval adopted by the latest decision in the *Dunn* case (107 N. W. 616). In the *Connors* case (1900) the Court, in referring to the *Haden* case, says:

"It may be remarked, however, that an employe, 'in keeping in repair the track of a railroad for the present operation of its trains,' while he may be exposed to the hazards, is not engaged 'in the business of operating a railroad;' such work is undoubtedly necessary therefor, but not in any way connected therewith. We are content with the conclusion reached in *Akeson's* case—that a railroad is only operated, within the meaning of the law, by 'moving trains, cars, engines or machinery on the track.'"

And, in referring to this ruling in the *Connors* case, the Court, in the latest case (*Dunn vs. Chicago R. I. & P. Ry. Co.*, 107 N. W. 616), says:

"Furthermore, the language in the *Haden* case is expressly referred to and discredited in the *Connors* case. Some, at least, of the cases, recognize and point out the distinction between the exposed risk of the injured, and the work which is so connected with the



operation of the road as to create liability under the Statute, and there can now be no question as to the distinction between the two."

All of the decisions of the Supreme Court of Iowa, concerning this legislation, will be found collected and briefly reviewed in Vol. 2 of Labatt on Master and Servant on pages 2112 to 2118, but a more careful examination, than could be there given, is required in order to reconcile some seeming conflicts and fully appreciate the underlying principle controlling all of the cases.

In the case at Bar the Record shows that Thomas Dillon, at the time of the unfortunate and fatal accident, was not engaged in the performance of any duties which exposed him to the peculiar and special hazards which are involved in the use and operation of railroads as defined and explained by the Court whose interpretation of this Statute is supposed and presumed to have been adopted by the Legislature of Montana. Dillon was merely riding in a caboose car of a freight train and had no duties of any kind to perform until he reached the station to which he was being transported.

It is true that he was, at that time, a railroad employe, but, as the Supreme Court of Iowa well said, "the purpose of the lawmakers was evidently not to make men, because employed by railroad companies, favorites of the law, but to afford protection owing to

the peculiar hazards of their situation." It must be always borne in mind that this Statute does not extend, was not intended to extend, and could not constitutionally be extended, to and include ALL railroad employes, and hence unless the injured employe and his negligent co-laborers are within the lawful, and therefore the intended, scope of the Statute, he must seek relief or protection outside of this Statute and not under its limited provisions.

The statement of facts, agreed upon between the parties to the case at Bar, show that "the duties of said Thomas Dillon \* \* \* were not to any extent connected with the moving or operation of cars, engines, trains or any part thereof," and it seems, therefore, legally impossible to extend to him the protective provisions of this constitutionally-limited and judicially-interpreted Statute.

#### THE ACT OF 1905.

#### WILFUL WRONGS ESSENTIAL TO LIABILITY.

Whatever doubt, if any, may be entertained as to the constitutionality of this Statute, as to the extent of its essentially limited scope (if its constitutionality has been saved by judicial interpretation), as to the classes of persons protected by it, or the persons who may maintain actions under it, there would seem to be no doubt, and no room for serious discussion or dispute

as to the character of the co-existing and co-operative causes which are required to produce the damages for which persons or corporations, operating railroads in this State, are ever to become liable to any one under this law.

The law declares that the persons and corporations referred to "shall be liable for all damages sustained \* \* \* in consequence of the neglect \* \* \*, or by the mismanagement \* \* \* AND in consequence of the wilful wrongs \* \* \* of any other employee."

If the Court feels justified in striking the word "and" from the Statute and inserting the word "or" in lieu thereof, possibly such a judicial amendment might so entirely alter the meaning of the Statute, as passed by the Legislature, as to warrant a vitally different construction; it is doubtless true that a great many other legislative enactments, and even constitutional provisions, could be made to express vitally different intent and purpose if either the executive or the judicial department were clothed with power to change the language used by the law-making body; and even if that power were limited exclusively to the addition, substitution or transposing of conjunctions, the modifications of statutory provisions which such a power would include might be found so extensive and serious as to practically postpone the application or enforcement of a substantial portion of the organic instrument, and of important Statutes, until after their final

structure had been determined by this supervisory potency, and possibly even lead to the prevention of the use of conjunctions by injunctions.

Unless the legislative language used in this Statute can be changed by some lawful procedure or by the exercise of some supervisory power, we can not escape the plain declaration, by the Statute, that the liability sought to be created shall only arise as to damages sustained either "in consequence of the neglect of any other employe or employes thereof \* \* \* AND in consequence of the wilful wrongs, whether of commission or omission, of any other employe or employes thereof;" "or by the mismanagement of any other employe or employes thereof AND in consequence of the wilful wrongs, whether of commission or omission, of any other employe or employes thereof."

However annoying this feature of the Statute may be to those who wish that the law was worded differently, and however confident some persons may feel that the Legislature would have changed the language of the law if attention had been called to its phraseology, such feelings only serve as a recognition of the fact that the law, in the form in which it was enacted, does not create liability for damages sustained only and solely "in consequence of the neglect of any other employe."

It may be always possible to discuss divergent views as to what should be the law under assumed or actual

conditions, but even the most cogent reasoning, or the most unanswerable logic, as to what might have been or should have been enacted would seem to be misnamed when advanced as an argument concerning the law as it actually it.

If the plain provisions of this Statute, as herein quoted, have not been accurately quoted by us, then, of course, our statements should be corrected; but if we have read the law correctly, and have stated its provisions just as they really are, no reiteration of the statutory requirements will make their meaning clearer to the Court, nor can the statement of these unambiguous sentences be converted into real argumentative discussion by mere repetition. We venture, therefore, to simply remind the Court that, in the absence of ambiguity in the language of any law, the duty of the judiciary is confined exclusively to the joyful or tearful announcement of the law as it is and neither the duty nor the right of construction can exist when the meaning of the legislative language is clear and free from doubt. Recurring, however, to the history of this borrowed legislation, we find that, in the State of Iowa, before the section (1307) of the Code of 1873 was created by the consolidation of the old Act of 1862 with the more recent Statute of 1872, there existed, at least for the period of time which elapsed after the passing of th Act of 1872 and before the adoption of the Code of 1873, these two Statutes (both hereinbe-

fore quoted), one creating liability for damages sustained "in consequence of any neglect of the agents, or by any mismanagement of the engineer or other employe of the corporation," and the other creating liability for damages "in consequence of the wilful wrongs, whether of commission or omission, of their agents and employes."

Labatt, in his work on Master and Servant, states (Vol. 2, page 2112) that the Act of 1862 was superseded by the Act of 1872, but the Supreme Court of Iowa seems to think otherwise.

In the case of Doley vs. Chicago R. I. & P. Co. (21 N. W. 127), the Court, after setting forth the provisions of each of these Statutes, says: "It will be seen that the two Acts of 1862 and 1872 were consolidated into one," thus plainly indicating that both were in force at the time of the adoption of the Code of 1873.

In answer to the argument that these two consolidated Statutes should still be treated, and construed separately, so that the provision limiting the benefits of the law to employes whose duties are connected with the use and operation of the railroad should only apply to cases wherein damages were sustained "in consequence of wilful wrongs," the Court says:

"Counsel for appellant claim that the union of these two separate and independent Acts of 1862 and 1872 did not modify the Act of 1862 in any respect, but that the liability remained the same as before for acts of

mere negligence, and that the words 'when such wrongs are in any manner connected with the use and operation of any railway,' in section 1307 of the Code, refer to the 'wilful wrongs' only and not to the neglect of agents or mismanagement of engineers mentioned in the preceding part of the section. We think it was the evident purpose of the Legislature, in adopting this provision of the Code, to fix the liability in all cases, and not to leave the Courts to complete the Statute <sup>by</sup> ~~by~~ judicial construction as was done with the Act of 1862. If we were to adopt the rule in Deppe's case, as governing the first clause of the section, it would be necessary to read the rule between the lines. We think it is not necessary to do that, but that the words 'such wrongs' may fairly be said to refer to the whole of the preceding part of the section. In a certain sense, all injuries resulting from negligence and mismanagement are wrongs, and it is not to be supposed that the Legislature intended that the employment of the injured party should be different where he claims damages by reason of negligence from what it is when the wrong done him is wilfully done."

It will be remembered that the Court, in Deppe's case, had construed the Act of 1862 to mean just what this last clause of the Code section provides and held that the Act would have been unconstitutional if its meaning were broader than the interpretation thus given, so that the Court was, of course, obliged to

hold in the Foley case, *supra*, that either the last clause of the section applied to the whole section, or the first clause must be again saved from unconstitutionality by so interpreting it as to restrict its operation precisely as the last clause of the Code section restricts it; or as the Court expresses it, "If we were to adopt the rule in Deppe's case, as governing the first clause of the section, it would be necessary to read the rule between the lines."

The Foley case, *supra*, therefore, merely holds that no employe is within any of the provisions of this section unless his employment is of such a character that his duties are connected with the use and operation of a railroad, and hence the words "such wrongs," when used in the limitation clause at the end of the section, do not refer only to "wilful wrongs," but to any of the wrongs or wrongful acts or omissions referred to in the section.

It will thus be seen that the precise question now being considered (if it can be called a question) was not presented, discussed or decided in the Foley case.

It may be well also to note, that the only question which was decided in the Foley case could not arise in connection with the Montana Statute for the reason that the expression "WHEN SUCH WRONGS are in any manner connected with the use and operation of any railway," as used in the Iowa Code Section, is changed in the Montana law so as to read "WHEN



SUCH NEGLECT, MISMANAGEMENT OR WRONGS are in any manner connected with the use and operation of any railway or railroad."

We are, of course, now seeking the true intent and meaning of the MONTANA Statute and, as the particular feature of this law which is now being considered has never been adjudicated by the Courts of the Parent State, we are forced to find the legislative intent in the Statute itself and to confine ourselves to the language used by the law-making body.

In seeking light upon the subject by an examination of the antecedent similar legislation in the State of Iowa, we find that, in the particulars now being considered the old Iowa Acts of 1862 and 1872 differ from the section (1307) of the Iowa Code of 1873, and that the Iowa Code section differs from the Montana Statute.

The Iowa Act of 1862 makes no reference to railway employes as the class of persons to be specially benefited, or to be benefited at all, by the protective provisions of the law; they are, of course, included in the general provisions of the Statute, but the language of the law hardly justifies its classification as a fellow servant Statute. It expressly extends its benefits, and the liability created by it, to every one injured by railroads in the manner indicated and only applies to railway employes because they are, of course (as is every one else), included in the very broad provision that

Railroad Companies "shall be liable for all damages sustained by ANY PERSON in consequence of neglect of agents, or by any mismanagement of the engineer or other employe of the corporation."

This is equally true of the later Iowa Act of 1872 which merely seeks to make owners and operators of railroads "liable for all damages sustained by ANY PERSON in consequence of the wilful wrongs of their agents and employes."

Likewise the provisions of the Iowa Code Section (1307) merely state unnecessarily that railway employes are included in the general expression, "any person," but bear no impress of special legislation for the protection of railway employes; they merely provide that a railroad corporation "shall be liable for all damages sustained by any person, INCLUDING EMPLOYES OF SUCH CORPORATION," and hence, we find that the Montana Statute is the first of this series of laws that can be treated and construed as a strictly Fellow Servant Law exclusively confined in its operation to railway employes. It declares that all persons or corporations operating a railroad in this State "shall be liable for all damages sustained BY ANY EMPLOYEE of such person or corporation."

We find, therefore, that, as to the special features of this legislation now being considered, we can obtain little or no assistance from the unconstrued legislation of Iowa which seems to have been mainly intended to

protect the general public ("any person") from the results of the negligence, mismanagement, and wilful wrongs of railway employes rather than to protect this class of employes from the carelessness of each other.

Whether, therefore, the Iowa Act of 1872 superseded the earlier Act of 1862 (as claimed by Mr. Labatt in his famous text book treating of these subjects) or not: whether, during the year 1872, the Railroad Companies of Iowa remained liable to "any person," and therefore every person, for the negligence or mismanagement of agents and employes under the Act of 1862, and also liable to every one for the wilful wrongs of agents and employes under the Act of 1872: whether under the Iowa Code Section (1307) which expressly, though unnecessarily, declared that the expression "any person" includes railway employes, the Railway Companies were liable to one suit, two suits, or three suits, resting upon "negligence," "mismanagement" and "wilful wrongs," respectively, the Courts of that State have not decided.

But when we confine our attention to the Montana Fellow Servant Act of 1905, unembarrassed by any curious combinations of strange Statutes in other States, we find that the more skilful and careful author of this Statute, designed solely and exclusively for the protection of railway employes, has, while using the Iowa Code section as his model, removed every doubtful phrase and written a law too clear in its declared

purposes and too precise in its language to leave room for doubt as to its meaning or justification for judicial construction.

The extent of the liability created by this Statute is clear; the person or corporation owning or operating a railroad in this State is "liable for all damages sustained by any employe of such person or corporation;" that is the unlimited nature of the liability created.

This liability shall arise whenever the damages, so sustained, are "inconsequence of the neglect of any other employe or employes thereof, or by the mismanagement of any other employe or employes thereof. AND in consequence of the wilful wrongs, whether of commission or omission, of any other employe or employes thereof."

We respectfully submit that the Court can only give effect to the legislative will as thus plainly proclaimed and unambiguously expressed.

### THE FEDERAL QUESTION.

The United States Congress having, by the Act approved June 11, 1906, assumed its exclusive constitutional control of the subject of employers' liabilities to employes, in so far as it relates to interstate commerce, the Montana Act of 1905 was thereby superseded as to such commerce, and as to all employes engaged or employed in such commerce; and, as the colliding freight trains are admitted to have been engaged in the trans-

portation of interstate freight, AND the negligent employees to have been engaged in the operation of such interstate trains, at the time of the accident (Tr. 15 and 16), no liability can arise out of any State legislation on this subject.

Appellant respectfully requests that the Court will specifically decide the question thus raised, but, by reason of the views expressed by this Court in its opinion in the recently decided case of State vs. Northern Pacific Ry. Co. (93 Pac. 945), appellant does not deem it necessary or proper to discuss the point thus presented or to cite authorities in support of contentions which seem to have been already rejected by this Court in its rulings in the case referred to.

Respectfully submitted.

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Attorneys for Appellant.









38 Mont. 485.  
100 Pac. 960

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No. 2625.

IN THE  
SUPREME COURT  
OF THE  
STATE OF MONTANA

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WINIFRED DILLON, MARY E. DILLON,  
JOHN H. DILLON and THOMAS DILLON,  
Jr., minors, by their Guardian WINIFRED  
DILLON,

Respondents,

vs.

GREAT NORTHERN RAILWAY COMPANY,  
a corporation,

Appellant.

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BRIEF OF RESPONDENTS.

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The brief of the appellant in this case is peculiar in that, as a general thing, it assumes the debatable propositions to be settled in favor of the appellant and debates the questions which are not open to discussion.

It is, for instance, quite beyond the realm of debate that the act of March 5, 1903, does not give to the respondents a right of action. Some ques-

tion might possibly arise as to whether the right of action given to the injured employe by that statute does not reach to injuries resulting in death, and whether if death ensues his right does not survive under the general survivor statutes. But if it does so survive, it must manifestly be prosecuted by his executor or administrator, neither of whom sues here.

On the other hand, it is declared as indisputable or settled propositions (1): That in the case of a survival statute of the nature of Lord Campbell's act, there is no right of recovery in the case of an instantaneous death; and (2) That the statute of 1905 is a survival statute. Both of these propositions are disputed by the respondents.

If one is injured through the negligence of another, and lingers thereafter a sufficient time to enable him to prosecute an action, he recovers either in a common law or in a statutory action the damages which he, himself, sustained, not what his wife and children or other dependents sustained. If he lingers and dies, the right of action, common law or statutory, is declared by the statutes of *some* states, general or special, to survive, contrary to the rule of the common law. In such case, just as in the case of any other right of action which survives, the suit is prosecuted by his personal representatives to recover the damages which *he* suffered. The measure of damages is

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the loss to him, or rather, in the case of his death, to his estate. It is equal to what would have come to his estate if the suit had been prosecuted before he died. In such case recovery is had for the pain and suffering endured by the deceased, if he suffered, and for *all* he lost in money by reason of his untimely taking off, as though he survived and was totally disabled. Such statutes are comparatively rare.

The more common statute is one which gives an independent right of action to his heirs or others within a restricted class, for the damages, not which he or his estate suffered, but which they suffer. They would not recover, for instance, an amount equal to the equivalent of *all* that he could earn had he lived, but only so much of what he could have earned as would be likely to come to them.

#### VI Thompson's Commentaries, 6986.

1.—If it be assumed that this is a survival statute, giving a right of action to the heirs or personal representatives for *all* that the estate of the deceased lost by his death, the respondents dispute that there is no right of recovery because the death was instantaneous.

2. The act of January 16, 1905, is not a survival statute.

1.—DOES AN INSTANTANEOUS DEATH FORBID A RECOVERY UNDER THE STAT-

**UTE?**

It is entirely unnecessary to attempt to follow the course of reasoning of the brief at pages 16 to 19, by which the conclusion is arrived at, on the assumption that the statute in question is a survival statute, that there is no right of recovery in the case of an instantaneous death.

The question has been so often determined against such a claim that there is no doubt that the rulings to that effect must be deemed to have been weaved into the statute.

In fact, the idea comes from some early Massachusetts cases which the courts of this country generally and even of the neighboring New England states have declined to follow. The State of Connecticut passed an act in 1848 reading as follows:

“Actions for injury to the person, whether the same do or do not result in death \* \* \* shall survive to his executor or administrator, provided the cause of action shall not have arisen more than one year before the death of the deceased.”

In 1875 this was changed (doubtless lest the Massachusetts cases should be considered as convincing) so as to read:

“All actions for injury to the person, whether the same do or do not instantaneously or otherwise result in death \* \* \* shall survive to his executor or administrator.”

Upon considerations like those advanced by appellant, the trial court in

*Broughel v. So. N. E. Tel. Co.*, 45 At. 437, was constrained to hold that only nominal damages could be recovered in a case of instantaneous death. The ruling was reversed, the court saying:

“The real cause of action arises from the wrongful act. Death is but the effect or consequence of the act. When that event ensues the effects of the act are, legally speaking, complete. Under the statute, it makes no difference, as to the liability of the wrong-doer, whether the complete effect of his act instantly follows the act, or follows it after some short interval of time. This was the meaning of the act, we think, even before its phraseology was changed in 1875. See the headnote in the case of *Murphy v. Railroad Co.*, 30 Conn. 184, and the reasoning of the court in that case. But, however, this may be, it is certain that since 1875 the remedy is given to the personal representative even in cases where death is instantaneous. The cases cited in the defendant’s brief, from Massachusetts, where it is held that in cases of instantaneous death the cause of action does not survive, have no bearing upon the construction of our statute, as shown by Ellsworth, J., in *Murphy v. Railroad Co.*, 30 Conn. 184.

“Our conclusion is that in the present case the trial court erred in holding that, because the death of Davis was instantaneous, the plaintiff was entitled to nominal damages

only, and for that error the judgment must be set aside."

In the earlier case, referred to in the excerpt last above quoted, the Connecticut court, after reviewing the Massachusetts cases and pointing out, as stated above that the statute of that state is peculiar in its language, said of the interpretation put upon it: "We think that construction rather nice and technical, and were our statute the same as theirs we are not prepared to say we should adopt it." Judge Cooley adopts this doubtful kind of a compliment on the course of the reasoning of the Massachusetts court, and seems to advance the view that the original Lord Campbell's act is a survival statute.

Cooley on Torts, 262-266.

The same indisposition to follow the reasoning of the Massachusetts cases is found to have prevailed quite generally. Tennessee declined, though as shown in

Roach vs. Imperial M. Co., 7 Fed. 698-704, its court held that the act of that state is a survival statute.

Railroad Co. vs. Price, 2 Heisk. 580;

Fawlk vs. Railroad, 5 Bax. 663.

The question was disposed of in New York contrary to the Massachusetts rule, though the statute was treated as though the right of action of the deceased survived to his representatives.

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Brown vs. Buffalo & S. L. R. Co., 22 N. Y.,  
194,

and Judge Comstock sensibly declared in

Whitford vs. Panama R. Co., 23 N. Y. 486  
that there is no such thing as a strictly instantaneous death, saying:

“The death may be sudden; in common language, instantaneous. But in every fatal casualty there must be a conceivable point of time, however minute, between the violence and the extinction of life. That period may be a year, or it may be less than the shortest known division of time.”

The remark, a simple recital of an obvious fact of science, is important upon two considerations. In the first place, the word “instantaneous” must be deemed to have been used in the stipulation in its commonly accepted meaning, as signifying that the death followed in close proximity to the blow, that lack of consciousness ensued without delay and that total cessation of the vital functions followed speedily thereafter. In the second place, it signifies that the legislature could not have meant to pass a statute which, as is contended, means that a recovery should not be had in a case which the accepted truths of science show, never does, in fact, occur. The supreme court of South Carolina, likewise, though holding their act to be a survival statute,

Price vs. Richmond & Danville R. R. Co.,

26 Am. St. Rep. 700-703,  
held that it permitted a recovery whether the death was instantaneous or lingering.

Reed vs. Northeastern R. Co., 16 S. E. 289.

In Kentucky a like conclusion was reached.

Givens vs. Ken. C. R. Co., 12 S. W. 257.

The Massachusetts cases are followed in Maine, but the results arrived at have been overcome by recent statutory enactments. The supreme court of South Dakota was convinced by them, however.

Belding vs. Black Hills, etc., 53 N. W. 750,  
and they were held persuasive in Mississippi.

McVey vs. Ill. Cen. R. R. Co., 19 So. 209.

Perhaps little if anything could be added to the discussion of the subject on its merits, if it has any, as it is set forth in the opinions referred to.

Nor is there any necessity for any close discrimination in the matter, since the statute in question was adopted from the state of Iowa and has been authoritatively construed by the highest court of that state as permitting a recovery in cases of instantaneous death.

The statute of that state will be found noted in

Minn. & St. Louis Ry. Co. vs. Herrick, 127  
U. S. 210.

It contains no provisions at all for recovering in case of death, but it has been held in that state that a right of action on account of injuries sur-



vives under the general statutes, and that the fact that death resulted instantaneously is immaterial.

The supreme court of Iowa seems to have been originally somewhat persuaded by the reasoning of the Massachusetts cases.

Sherman vs. Western Stage Co., 24 Ia. 515. Later it recognized, as pointed out by Judge Comstock, that there can be no such thing as a strictly instantaneous death.

Kellow vs. Cent. Ia. Ry. Co., 23 N. W. 740;  
S. C. 27 N. W. 466.

And finally it squarely adjudicated that the fact that the death was instantaneous was no obstacle at all to recovery.

Conners vs. Burlington etc. Ry. Co., 32 N. W. 465.

Worden vs. Humeston & S. R. Co., 33 N. W. 629.

The legislature of this state, adopting the Iowa statute and being uncertain whether our general survival statutes might not be construed as being as comprehensive as those of Iowa, added to the law a section which would put it past doubt that an action could be maintained against the common employer in the case of a death resulting from the negligence or wilful wrongs of a fellow-servant when the wrong was connected with the use and operation of a railway.

## 2.—IS THE LAW A SURVIVAL STATUTE?

The subject has been discussed thus far on the assumption that the statute in question is a survival statute, giving to the personal representatives for the heirs, or to the heirs themselves, the right to prosecute the right of action which the deceased himself had or would have had, had he not died, and not a right of action for the damages which the heirs themselves sustained.

But that is not the proper view to take of the statute. The measure of damages ought not, in such an action, to be the whole loss which the deceased would have sustained had he survived and prosecuted the action himself, suffering total disability. It is scarcely to be conceived that the legislature intended to confer any such right on the heirs. It undoubtedly intended they should recover what they lost, not what he lost. Almost invariably their loss must be less than his. All he could earn had he lived would come to him. Such an amount should become the basis of any verdict recovered by him for pecuniary damage. Only a part of what he could earn would go to his heirs. Such part should be the basis of their recovery.

The bare fact that the word "survive" occurs in the statute is not at all controlling. Logically there can be no such thing as a survival of a right to recover for death. The man who died never.

under any circumstances, whether his death was lingering or instantaneous, had any right of action to recover for his own death. So no action to recover for his death could possibly "survive" in the sense in which the word is used to indicate the right to sue, for instance, on a promissory note given to the decedent.

The statute is to be construed in the light of the general legislation on the subject. We are to try to get at what the legislature meant,—whether to give a new and independent right of action to the heirs for the *death*, or whether it intended to carry over to them a right of action which the deceased would have had if he had not died.

It is to be borne in mind that the "general theory of American statutes on this subject is that the action" is "newly created," and is "entirely distinct from any action which the deceased might have had, had he lived." And this for the two reasons adverted to, namely, that the action is for his death, and he could have no action for that; and second, because it is not fair to enable the heirs to recover the equivalent of *all* he could earn, and more particularly is it not fair to permit *them* to recover for the pain and suffering *he* endured.

We start, then, with the assumption that the legislature had no purpose to depart from the gen-

eral course and current of legislation on the subject. The inquiry also arises at once as to what conceivable reason the legislature could have had for authorizing the maintenance of a right of action by the heirs in the case of a death of a man who lived five minutes after an injury, and withholding the right in the case of another who died instantly. Certainly a deliberate purpose to create such a distinction, without a shred of reason for it, and at war with the manifest general idea of such legislation is not to be attributed to the law-making body.

And, examining the language, we find it supports the view that they did not intend to do so.

The brief of the appellant says that it is the right of action given to the injured servant referred to in the first section which is carried over to his heirs or personal representatives,—it is *his* right of action which survives. But the statute does not say “*his*” right of action survives, but “*the*” right of action. That is, the right of action lives after him in his heirs or personal representatives. Besides, if it was intended that there should be simply an abrogation of the common-law rule “*Actio personalis moritur cum persona*,” the section would have ended with the word “survive.” That would have been sufficient. *His* right of action would then accrue to his executor or administrator. It was wholly un-

necessary to make any further provision. But the action may be prosecuted under this statute by the heirs who would be under no obligation to account to his estate. Even if suit should be brought by the administrator, under the uniform construction of these laws, it would be for the benefit of the heirs suffering by his death, and the avails would not become assets of his estate.

An act even more equivocal and ambiguous in its language, in view of similar considerations, was held to grant a new right and not to be a survival statute in

Matz vs. Chicago & A. R. Co., 85 Fed. 180-188.

The legislature did not stop with the word "survive," but continued and authorized the institution and prosecution of the suit by the same person entitled to sue under the provisions of Section 579 of the Code of Civil Procedure, to whom, confessedly, is given a new right of action.

It is conceded by all the authorities that if the statute gives a new right of action *for the death*, it is immaterial that it was "instantaneous."

Some misconception might arise by reason of the quotation made in the brief from the opinion in the case of

Barton vs. Brown, 145 U. S. 335.

The case holds, not that there can be no recovery at all in the case of an instantaneous death, but that in such case there can be no recovery on account of the pain and suffering of the deceased. Such a ruling accords with reason and the principle is generally accepted.

8 Am. & Eng. Ency. of Law, 806.

3.—WAS THE DECEASED WITHIN THE CLASS PROTECTED BY THE STATUTE?

The main argument of appellant's brief, as counsel for the respondents gather it, is that the statute in question was not passed for the protection of *all* employes of railroads, but only of those whose employment brings them within the special risks and hazards of railroad operation.

The argument is perhaps pointed by the discussion at pages 24 and 25, which, reduced to a narrow compass, is that an Auditor of the company who may be traveling on the railroad either in the discharge of his duties, or en route to or from the place where he discharges them, is not within the protection of the statute, and, therefore, an Assistant Roadmaster is not.

It is unnecessary to stop to inquire whether a traveling auditor—one who rides on the trains of the railroad company from station to station to check the accounts of agents of the company—may or may not recover under the statute; or,

what is the same question, whether an attorney employed in the legal department, on a salary say, who rides from place to place as occasion requires, attending to the legal business of the company, and who is injured while so riding on its trains, may recover under the statute. But if he can not, it is because he is not an "employee" within the meaning of the statute. And if he is not, he does not need the protection of the statute. He does not require any legislation to enable him to recover. He may maintain a common law action, and if he is not an "employee" within the meaning of the fellow-servant rule, the defense of fellow-servant cannot be urged against his action.

The statute was unquestionably intended for the relief of all those who would be barred of a right of recovery by reason of the fellow-servant rule, who suffered injuries in the use and operation of any railroad in this state, inflicted in the course of their employment.

So if the argument is good that the deceased belonged to an entirely separate department from the train operatives, that he was not engaged in the hazardous business which alone justifies the special favor which the act grants, he may recover regardless of the statute. Perhaps the counsel for the respondents admitted too much in admitting that he was a fellow-servant with those through whose negligence he was killed, particularly as it

does not appear from the statement of facts that he was actually engaged in the discharge of his duties at the time he was injured, except as it appears from the recital that the train operatives were his fellow-servants. Of course, if he was being transported on the caboose, not as an incident of his service, or in the discharge of his duties, the train crew were not his "fellow-servants."

Perhaps the counsel for the appellant is right that he belonged to such a distinct department of the service, he is so disconnected from the hazardous part of the business in the general conduct of which he, like the local counsel, for instance, was, with the negligent servants, jointly engaged, that he cannot be called their fellow-servant. If so, the court should regard the recital in the stipulation that he was a fellow-servant as a mis-recital of a matter of law and sustain the judgment on the ground that, it being admitted that he was killed by the negligence of the appellant's servants operating the train on which he was riding, the defense of fellow-servant does not apply at all.

Authorities could be found which would fully sustain such a view. They hold that one engaged in repair work or construction, being engaged in a different department of the service, is not a fellow-servant with train operatives, and that consequently such a one may recover of the railroad



company regardless of any statute for injuries suffered by reason of the negligence of a member of a train crew.

St. Louis, I. M. & S. Ry. Co. vs. Harmon,  
109 S. W. 295;

Enos vs. Rhode Island, 67 At. 5.

It is but fair to the court to say, however, that the great weight of modern authority is to the effect that those engaged in construction or repair work, however it be with the accountant or the lawyer employed by the railroad company, are fellow-servants of the train crews operating the trains on which they ride in going to or from their work, and that for the negligence of the latter, resulting in the injury to the former, there is no right of recovery at common law. The case of

Texas & Pacific R. Co. vs. Smith, 31 L. R.  
A. 321,

so holds, and in a note to the report of it, as above, is collated a large number of cases to the same effect. See also

Kilduff vs. Boston etc., 81 N. E. 191.

If the defense of fellow-servant was available at the common law in such a case, it follows logically that the statute in question affords a remedy, for its purpose was unquestionably to give relief in cases occurring in the operation of railroads in which, otherwise, the fellow-servant rule would be an obstacle to recovery.

Its benefits are held, in Iowa, to extend to all employes who are engaged in the business of operating railroads, or who are, by the nature of their employment, exposed to the hazard incident to moving trains.

Smith vs. Humeston & S. R. Co., 43 N. W.  
545.

Recovery was justified in that case for injuries sustained by a laborer employed to keep the track clear of snow, and who was in the caboose of a train to be carried to another obstruction. Also in a case where an employe engaged in the work of taking down and removing a bridge was compelled by orders of his superior to go upon one of the company's trains and who while so riding was injured.

Schroeder vs. Chicago etc. Ry. Co., 47 Ia.  
375.

And under an employment said to be identical by the court in

Rayburn vs. Central I. Ry. Co., 35 N. W.  
606.

And under conditions quite similar in

Smith vs. Chicago & G. W. Ry. Co., 80 N.  
W. 658.

Lists of the Iowa cases, with classifications—those in which the statute has been held applicable, and those in which the injury was declared to be outside its scope—are found in

IV Thompson's Commentaries, 5294; and  
II Labatt on Master & Servant, 759.

Many of them are reviewed in

C. M. & St. P. Ry. Co. vs. Artery, 137 U.  
S. 507.

None of the cases referred to in the brief warrant the conclusion that the Iowa court would hold or ever did hold that the statute does not extend to a case like that at bar.

The point decided in the case of *Dunne vs. C. R. I. & P. Ry. Co.* 107 N. W. 616, referred to in the brief, is that the ordinary work of a section gang along the track is not such as that one injured while engaged in it can claim relief under the statute. If he were injured, however, while riding to or from his work by reason of the injury of the train-crew operating the train that carried him, the case would be different, as ruled in

Smith vs. Humeston, 43 N. W. 545.

Smith vs. Burlington, 12 N. W. 763.

There was a strong dissenting opinion in the Dunne case, in which reference was made to the ruling of the supreme court of Minnesota and in the case of

Njus vs. Railroad Co., 49 N. W. 527,  
sustaining a recovery in an action brought in that state to recover under the Iowa statute for an injury suffered in the last mentioned state. The

plaintiff, a section man, was injured in unloading iron bars from a car on the railroad track. The Iowa cases were reviewed, and the conclusion reached that they sustained the claim of a right to recover in such a case. Judge Weaver in his dissenting opinion in the Dunne case, after reciting the ruling of the Minnesota court, remarks:

“We may add that the Minnesota court also confesses its inability to distinguish some of our cases which uphold a recovery from some others where recovery has been denied, a feeling of uncertainty which future generations of lawyers will no doubt share with that distinguished tribunal.”

Whatever uncertainty there may be in the Iowa decisions, however, as to injuries received in any other manner, there seems to be none that a right of recovery exists when the servant was injured “by the actual movement of trains, cars or machinery on the track,” and that “the employment at the time of the injury must have exposed him to the hazards of railroading without reference to what he may be required to do at other times.”

So much is conceded by the cases on which the appellant relies.

Akeson vs. C. B. & Q. Co., 75 N. W. 676.

In the last mentioned case a recovery was held warranted where one employed to help coal a locomotive was injured by the negligence of another engaged with him in that work.

In

Reddington vs. C. M. & St. P. Ry. Co., 78  
N. W., 800,

a recovery, was denied.

It was before this court at the same time as the Akesson case, the decision being rendered originally but two days after. The opinions follow each other in the Northwestern Reporter, the original opinion in the Reddington case being found at page 679 of the 75th Northwestern. The conclusion arrived at was the same in both cases, but a rehearing being granted in the Reddington case, the original holding was overruled.

In that case a brakeman who was assisting in coaling a locomotive was injured by the negligent handling of a crane by a fellow employe. On rehearing the Akesson case was distinguished in this, that in that case the engine was detached from the train in order to be coaled from a car on a track alongside of which the engine was brought. The injured servant and another transported the coal in wheel-barrows from the car to the tender over a bridge of loose plank. When the work was completed the alleged negligent servant went on the tender and shoved one of the planks back on to the car on which the plaintiff remained, *in order to allow the engine to move*. The plank struck the foot of the plaintiff and injured him. The feature expressed by the clause italicized above served, in

the opinion of the court, to distinguish the two cases, making the injury in the Akeson case to have occurred in the operation of the road.

The Foley case is the only one cited in the brief of appellant resembling in its facts the case at bar closely enough to afford the basis for much argument, and it is readily distinguishable.

In that case the plaintiff was a car-repairer, and as such at times went by the trains of the defendant company from place to place to repair cars standing in the yards. When injured he was at work at a car which had been raised by jack-screws. While in that position the car tilted and injured him. It will be observed that he was not injured by the operation,—that is, the movement of a train. The court did, indeed, use the language quoted in the brief of the appellant. But he was not injured while he was riding on the train in going to or from his work in consequence of the negligence of the train operatives.

That was the ground of the decision, the court saying in the opinion: "With the exception of Deppe's case, all actions in which this court determined that railroad companies are liable in this class of cases, are those where the injury was received by the movement of cars or engines upon the track," citing cases.

The right of recovery, it will be noticed from the above quotation, is not restricted to those

whose duties require them to operate the trains, but extends, contrary to proposition C of appellant's brief, page 8, to those who are, as said in

Smith vs. Humeston, 43 N. W. 545,

"by the nature of their employment exposed to the hazards incidents to moving trains, even though they are not engaged in moving them."

And in support of this view there was cited

Pyne vs. C. B. & Q. Ry. Co., 6 N. W. 281,

in which recovery was permitted in the case of a detective walking under direction along the track, who was injured by the negligence of an engineer.

Pierce vs. Central Iowa R. Co., 34 N. W.

783,

in which a mechanic engaged in putting screens in a car train at a station was injured by the train's moving; and others of like character.

And, on consideration of the statute, it will be seen at once that it is not the injured servant who must be or whose duties must be "connected with the use and operation of any railway," but the "neglect, mismanagement and wrongs" must be so connected; that is to say, the neglect, or other wrong, of the person causing the injury must be connected with the operation of the road.

The only other case relied on by the appellant is

Malone vs. Burlington, 21 N. W. 756.

In that case an engine wiper working about a round-house was injured by reason of the door

falling on him, in consequence of its being raised by a crow-bar by an assistant in order to close it.

On the other hand, it has been held that an employe about the round-house who assists a hostler in moving an engine out of it, and through the yards, and who is injured in such work by the negligence of the hostler may recover.

Butler vs. C. B. & Q. R. Co., 54 N. W. 208.

The Iowa court has been called upon in a number of cases to rule as to the applicability of the statutes to section men, and the conclusion seems to have been definitely arrived at that if their duties require them to ride on trains, they may recover when the injury is inflicted while they are so riding.

Smith vs. Burlington, 12 N. W. 763;

Smith vs. Humeston, 43 N. W. 545.

It was because the plaintiff in the Foley case was not riding on the train at the time he was injured and, perhaps, because he was not injured by a moving train running into him,—in other words, because he was not injured by the *operation* of a train, that he was denied a recovery. Indeed, it is held that if the injury was suffered by reason of the movement of a hand-car, the statute is as applicable as though caused by the movement of a train.

Railway Co. vs. Artery, 137 U. S. 507;

Larson vs. Ill. C. R. Co., 58 N. W. 1076.



From these cases it is not difficult to extract the governing rule. It is easy. It is simple. In the first place, the injured person must be a fellow-servant, as that term is employed in the law. And in the second place, the wrong or neglect must be connected with the operation of the railroad.

It is not difficult to discern that in each of the cases relied upon by the appellant the neglect was not connected with the operation of the railroad. It certainly cannot be said in this case that it was not. Appellants take isolated sentences from the opinions in the cases cited, without considering or presenting the facts to show what was decided. The Iowa court itself has declared this to be an unsafe guide, saying in

Jensen vs. Omaha & St. L. Ry. Co., 88 N. W. 952-953:

“Language has been employed which, standing alone, and literally construed, might seem to imply that no employe, unless he be a trainman, and no injury except such as is received in the movement of trains, are contemplated by the statute. This interpretation we have held in numerous cases to be entirely too narrow. Among others found to be entitled to recover have been the section hand, the section foreman, the shop hand, the clinker man, the detective, the gravel shoveler, and the snow shoveler; none of whom had any connection with the train service proper.”

The brief of appellant speaks of some discord in the otherwise harmonious rulings of the Iowa

court by reason of the decision in

Haden vs. S. C. & Pac. Ry. Co., 60 N. W.  
537,

said to have been disapproved in later cases, Connors vs. Ry. Co. and Dunne vs. Ry. Co.

It is difficult to understand how the decision could have been different in the Haden case. The plaintiff, a section man, was injured by a passing train due to the negligence of a brakeman. There is some confusing language about the hazardous character of the business in which he was engaged, but the decision is put on the ground, and the plaintiff was held entitled to recover because the brakeman whose wrong caused the injury was at the time and in the respect in which he was negligent "connected with the use and operation of the railroad."

There is no dissent at all from the views expressed in this case recorded in the opinion in the Connors case. Indeed, it is, on the contrary, reaffirmed and declared to be sound. It is pointed out that the employe whose negligence caused the injury was engaged at the time in the operation of the railroad,—in fact, was one of the train men, and that Haden was engaged in work that exposed him to the hazards of railroading, though he was not engaged "in the business of operating a railroad." So he was held entitled to recover. While some of the language used in the Haden

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case is criticised in the Dunne case, the soundness of the conclusion reached is reasserted. It is pointed out that the defendant company in that case contended that no recovery could be had because *his* duties (those of the injured servant) were not connected with the operation of the railroad; but it was shown that it had been decided that that fact was immaterial, if he was exposed by his employment to the hazards of railroading, and the *other fellow*, the negligent servant whose duties omitted or done faultily occasioned the injury, was connected with the operation of the railroad.

It is apparent on an examination of the cases cited on this branch of the brief that they do not support the argument made at all. The argument is that the fellow-servant law extends only to those whose employment exposes them to the hazards of the railroad business, that if the law embraced any other person it would be to that extent unconstitutional and void, and that the employment of the deceased did not expose him to such hazards as that he could claim the protection of any fellow-servant statute. Few, if any, of the cases cited in the brief deny a recovery because the person injured was not exposed to sufficient hazard to bring him within the protection of a

special statute. Recovery was denied in most, if not all of them, because the injury was not inflicted in consequence of neglect or wrongs connected with the *operation* of a railroad. No case has been cited, and none has probably ever been decided, in which it was held that an employe of a railroad company, whose duties require him to ride on railroad trains and who is injured while so riding, is not exposed to the hazards of the operation of a railroad, and likewise no case has been cited to the effect, nor has any case ever held that if injured by the neglect of train operatives, in respect to the duties devolving upon them in their employment, while he was so riding on a train, the neglect or wrong was not connected with the operation of a railway.

The question which the brief raises is, perhaps, more directly considered by the courts of states other than Iowa having similar statutes.

In

Steffenson vs. C. M. & St. P. Ry. Co., 47  
N. W. 1068,

in which the right of a section man to recover for injury occasioned by being run down by a train was considered, the court said:

“It includes the cases of servants exposed to and injured by the dangers peculiar to the use and operation of railroads. The defendant argues that those dangers are such only as are incident to the running of trains. From

the running of trains propelled by locomotives at high rates of speed arises, undoubtedly, the greatest danger to which those engaged in operating railroads are exposed. But they are not the only ones incidental and peculiar to the business. Other persons than those running the trains are to be regarded as engaged in, and exposed to the dangers of, operating the railroad. The men whose business it is to keep the track in repair for the trains to run over—switchmen, men engaged in making up trains, and moving the cars back and forth in the yards and on side tracks—are all engaged in operating the railroad; and they are all exposed to dangers peculiar to that business. Sectionmen, as well as engineers, conductors, firemen, and brakemen, are operating the railroad. Their duties are peculiar to that business, unlike those pertaining to any other business; and there are dangers peculiar to those duties, unlike the dangers that attend any other business. They employ modes and instrumentalities in performing their duties that are not employed in any other business; and whatever dangers are incident to the employment of such modes and instrumentalities are to be regarded as peculiar to their business.”

Further cases showing the classes of persons coming under the protection of the Minnesota statute are found collated in

IV Thompson's Commentaries, 5299.

Under the Kansas statute, similar in character, in

IV Thompson's Commentaries, 5296.

A case recently determined by the Circuit Court

of Appeals seems to put past question that the deceased was exposed to the hazards of railroad-ing. From the opinion the following quotation is made:

“Inasmuch as it was absolutely necessary that the deceased should be carried to and from his work, and as he continued to be an employe of the company while being so carried, it seems entirely clear that while going and returning he was still subject to the same hazard peculiar to the operation of the railroad as he was while actually performing the work of repairing the track. That he still continued to be a servant while being carried from his work, and not a passenger, see *Kansas Pacific R. R. Co. v. Slamon*, 11 Kan. 83-91; *McQueen v. Central Branch, etc. R. R. Co.*, 30 Kan. 689, 1 Pac. 639; *Vick v. N. Y. Central, etc. R. R. Co.*, 95 N. Y. 267, 47 Am. Rep. 36; *Higgins v. Hannibal & St. Joe R. R. Co.*, 36 Mo. 418-433; *Russell v. Railroad Co.*, 17 N. Y. 134; *St. Louis, etc., R. R. Co. v. Waggoner*, 90 Ill. App. 556; *Gillshannon v. Stony Brook R. R. Co.*, 10 Cush. (Mass.) 228; *Wright v. Railroad Co.*, 2 Ohio Dec. (reprint) 359, 2 Western Law Monthly, 495; *Ionnone v. N. Y. etc. R. R. Co.*, 21 R. I. 452, 44 Atl. 592, 46 L. R. A. 730, 79 Am. St. Rep. 812; *Chattanooga v. Venable*, 105 Tenn. 460, 58 S. W. 861, 51 L. R. A. 886.”

*Iarussi v. Missouri Pac. Ry. Co.*, 155 Fed. 657.

Kindred statutes of many states are reviewed in

*Callahan vs. St. Louis Ry. Co.*, 60 L. R. A.

249,

and many cases cited showing that there is not the slightest objection on constitutional grounds to giving the statute a construction broad enough to include the deceased. A further review will be found in the case of

Jemming vs. G. N. Ry. Co., 104 N. W. 1079.

#### 4.—THE CLAIM THAT WILFUL WRONG IS A REQUISITE OF THE RIGHT OF ACTION UNDER THE STATUTE.

It is not intended to follow in detail the argument of the brief on this feature. Much of it seems rather more appropriate to other propositions advanced in the brief. The conclusion contended for cannot be admitted at all. One must shut his eyes to the obvious intent of the legislature to find any such meaning in the statute. It requires a complete sacrifice of the spirit of the law to the letter to yield to the views expressed by the appellant on this feature of the case, even though one should be disposed to accept the idea advanced as to the importance of the conjunctions used. The brief practically admits as much. But regarded literally even, the appellant is wrong. Bringing the two clauses in question into juxtaposition by dropping out "or by the mismanagement of any other employee or employees thereof," and the statute reads:

"Every person or corporation operating

a railway or railroad in this state shall be liable for all damages sustained by an employee of such person or corporation in consequence of the neglect of any other employee or employees thereof, and in consequence of the wilful wrongs . . . of any other employee or employees thereof."

Such a statute does not mean, analyzing it not as a court would, but as a class in rhetoric or English composition would, that the neglect and the wilful wrong must co-exist. The language does not admit of such a construction. The repetition of the words "in consequence of" forbids that it be given such meaning. If it read "shall be liable in consequence of the neglect and wilful wrongs of any other employee, etc.," it might be forcibly contended that both conditions must exist; but even then the proposition would be open to doubt.

The inadmissibility of the appellant's contention is equally apparent if we drop out the "neglect" clause and read the statute "shall be liable for all damages sustained by any employee . . . by the mismanagement of any other employee or employees thereof and in consequence of the wilful wrongs . . . of any other employee, etc."

It is often a matter of pure choice whether one shall use "and" or "or" to express his meaning, the meaning being obvious and the same whichever conjunction is used, thus: "A master is liable for the failure to exercise reasonable care in pro-



viding a safe place, safe machinery and competent fellow servants." No one could doubt this to mean that he is liable if he fails in providing any of these. "Or" could be used instead of "and" in such a sentence, but the meaning would not be changed. If a statute should be enacted reading that banks may lend money on "chattel and personal security," no one would contend that both kinds of security must be exacted. The statute means the same as though it read "chattel or personal security."

In

People vs. Pool, 27 Cal. 573-581,

the court said:

"The word *and* is not always to be taken conjunctively. It is sometimes, in a fair and rational construction of a statute, to be read *or*, and taken disjunctively."

But if to effectuate the intention of the legislature the word "and" must be read "or," the courts have never hesitated to do so. The notes to

2 Am. & Eng. Ency. of Law, 334,

make reference to many cases in which this was done. The Supreme Court of the United States says in

United States vs. Fisk, 3 Wall. 445:

"In the construction of statutes, it is the duty of the court to ascertain the clear intention of the Legislature. In order to do this, courts are often compelled to construe 'or' as meaning 'and,' and again 'and' as mean-

ing 'or.' ”

Even in the construction of criminal statutes, this is done, as witness the following from the supreme court of Iowa :

“In the construction of statutes the words ‘and’ and ‘or’ are convertible, as the sense may require, even in a criminal statute, where a strict construction usually prevails. *State v. Myers*, 10 Iowa, 448; *State v. Brandt*, 41 Iowa, 593.”

*Williams vs. Poor*, 21 N. W. 753-755.

It can scarcely be believed that, much as this statute has been studied by courts and lawyers, many of the latter skilled by experience in the detection of possible flaws in acts of like character, the point now for the first time apparently urged to defeat its operation, for that would be the practical effect, had never occurred to any of them. It is rather to be concluded that no lawyer until now deemed the question worthy of presentation.

With all deference to the learned counsel preparing the brief, it is said that he has erred in his heading for this branch of his argument. If his reasoning is sound recovery could not be had even in the case of a wilful wrong. The wilful wrong must co-exist with neglect. Liability exists only when the guilty servant is guilty at one and the same time of “neglect” and “wilful wrong.” That is, if his argument means anything it means that. But such a conclusion bord-

ers so closely on absurdity that even the counsel backs away from it, and heads his argument “Wilful Wrongs Essential to Liability.”

#### 5.—NATIONAL LEGISLATION.

The death of Thomas Dillon occurred on September 20, 1906. There was at that time no national legislation covering the subject. The act of June 11, 1906, was held unconstitutional in

Howard vs. I. C. Ry. Co., 207 U. S. 463.

The present federal statute had not been enacted when the death in question occurred. It certainly can not be contended that the later legislation destroyed pre-existing causes of action arising under state statutes.

The chronology of the case obviates the necessity of inquiring into the question as to whether when Congress gives a right of recovery for the negligence of a fellow-servant, all state statutes are abrogated *ipso facto*, and as to whether Congress has power to give a right of action merely because the train in connection with which the injury occurs moves from one state to another. Neither proposition is admitted. The case simply does not permit discussion of either question. (The writer was puzzled whether to use “or” or “and” in the third sentence back.)

—36—

The judgment ought not to be disturbed.

Respectfully submitted,

D. F. SMITH and

WALSH & NOLAN,

Attorneys for Respondents.

T. J. WALSH,

Counsel for Respondents.

213 Mont. 135.

**IN THE**  
**Supreme Court of the United States**

OCTOBER TERM, 1908.

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**JAMES S. KEERL,**

Plaintiff in Error,

**vs.**

**THE STATE OF MONTANA,**

---

**IN ERROR TO THE SUPREME COURT OF THE  
STATE OF MONTANA.**

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**BRIEF OF PLAINTIFF IN ERROR.**

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**I.**

**STATEMENT OF THE CASE.**

The plaintiff in error was charged in the district court of Lewis and Clark County, State of Montana, by information, of the crime of murder in the first degree, was tried and convicted of murder in the second degree, and sentenced to imprisonment for life.

Transcript, page 75.

The judgment was reversed by the Supreme Court of Montana, and he was again put upon trial. The case having been submitted to the jury, they retired and afterwards re-

turned into court, whereupon proceedings were had resulting in the court's making the following order shown by the record, to-wit: "It satisfactorily appearing to the court *there is a reasonable probability that the jury cannot agree*, court ordered the jury discharged from further consideration of this cause and that the defendant be remanded to the custody of the sheriff."

Transcript, pages 83-84.

He was put upon trial a third time, but before the trial he interposed a plea of former jeopardy, reciting the facts of the former trials and concluding as follows:

"The said jury retired to deliberate and having on the 14th day of July, 1904, after the expiration of about 24 hours after their retirement to deliberate upon their verdict, returned into court, they were questioned by the court as to whether they had agreed, and having reported to the court as the fact was, that they had not agreed, the said jury were, by the said court on the said 14th day of July, 1904, without the consent of the defendant and without having arrived at or returned any verdict, discharged, without there existing any necessity for the discharge of the said jury and without there being or existing no reasonable probability that the said jury could or would agree upon a verdict, and without its appearing to the court that there was no reasonable probability that the said jury could or would agree upon a verdict. That upon the said court's having so questioned the said jury as to whether they had agreed, the said court directed the clerk thereof to enter of record that the court found that there was a reasonable probability that the said jury would not agree and that they were, for that reason, discharged; that save as aforesaid no adjudication or record was made concerning the necessity for or of the cause of the discharge of the said jury and that no necessity for or of the cause of such discharge of the said jury, existed save as recited in the said entry so made

and directed to be made. Now the defendant asserts that for the reasons hereinbefore in this special plea set forth he ought not again to be tried for the offense or for any offense charged in the information herein and that to do so, in view of the facts aforesaid, would be to place him twice in jeopardy for the same offense contrary to the provisions of the Constitution of the State of Montana, and that any judgment of conviction herein or any proceedings further to hold the defendant to answer to the said information, or the charge therein, or to put him upon trial for the same would be to deprive him of his liberty without due process of law."

Transcript, pages 5-6,

thus invoking the protection of the 14th Amendment to the Constitution of the United States. To this plea the state replied, admitting the facts in relation to the discharge of the jury, saying in reference thereto:

"The said jury retired to deliberate upon their verdict, and having on the 14th day of July, 1904, after the expiration of about twenty-four hours after their retirement to deliberate as aforesaid, returned into court and reported to said court their inability to agree upon a verdict in said cause, and thereupon and on said 14th day of July, 1904, it appearing satisfactorily to said court that there was reasonable probability that said jury could not agree, and after the making and entering of an order by said court in the records of said court in said cause that it satisfactorily appeared to said court that there was a reasonable probability that said jury could not agree, said jury was by said court discharged from further consideration of said cause; that at the time said jury was discharged as aforesaid the said defendant was present in court in person and was then and there represented by his counsel who were likewise present in court, and no objection was interposed by said defendant or his said counsel at said time or at all to the discharge of said jury as aforesaid."

Transcript, page 38.

But the court instructed the jury to return a verdict in favor of the state on this plea of former jeopardy, saying:

“In addition to the plea of not guilty, the defendant has pleaded in substance that he has been acquitted of every grade of the offense charged in the information, by the judgment or order of the district court of the First Judicial District of the State of Montana in and for the county of Lewis and Clark on the 14th day of July, 1904, by the alleged premature discharge of the jury then impanelled in this cause therein, then pending. This plea is denominated defendant's second plea. You are instructed to return a verdict in favor of the State as to this plea.”

Instruction No. 52, Transcript, page 31.

This it did.

Transcript, page 17.

The jury also found the plaintiff in error guilty of manslaughter,

Transcript, page 18,

and he was sentenced to be confined in the state prison for a period of ten years.

Transcript, page 19.

From this judgment of conviction he appealed to the Supreme Court of the State of Montana, by which tribunal it was affirmed.

Transcript, page 104.

A petition for a rehearing was denied,

Transcript, page 115,

and a writ of error to this court was sued out.

Transcript, pages 121-122.



And now the plaintiff in error makes the following

## II.

### SPECIFICATION OF ERRORS.

1. The Supreme Court of the State of Montana erred in holding that the district court properly refused to sustain the second plea of plaintiff in error that he was once in jeopardy, and acquitted through the improper discharge of the jury on the second trial.

2. The Supreme Court of the State of Montana erred in holding that the district court properly refused to sustain the second plea of plaintiff in error that he was once in jeopardy, and acquitted through the improper discharge of the jury upon the second trial, because that after the jury had retired to deliberate upon their verdict, and had returned into court and reported that they had not agreed upon their verdict they were discharged by the court without the consent of the plaintiff in error, upon it appearing to the court simply that there was reasonable probability that the said jury would not agree.

3. The Supreme Court of the State of Montana erred in holding that the district court properly refused to sustain the second plea of plaintiff in error after he was once in jeopardy and acquitted, through the improper discharge of the jury upon the second trial, because that after the jury had retired to deliberate upon their verdict, and had returned into court and reported that they had not agreed upon their verdict, they were discharged by the court without the consent of the plaintiff in error, without it appear-

ing that there was no reasonable probability that the said jury would agree.

### III.

#### ARGUMENT.

The jury was discharged on the second trial after the cause had been submitted to them, by the court, pursuant to the provisions of Section 2125 of the Penal Code of Montana, as follows:

“Except as provided in the last section, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict, and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless at the expiration of such time as the court may deem proper, it satisfactorily appears that there is reasonable probability that the jury cannot agree.”

The plaintiff in error contends that a discharge of the jury without a verdict under conditions such as are contemplated in this statute operates as an acquittal and that, in view of constitutional restrictions, he was not subject to further trial or prosecution for the offense for which he was on trial before the jury so discharged.

Contending that he was acquitted by the action of the court in so discharging the jury, he insists that all subsequent proceedings against him are in violation of the 14th Amendment to the Constitution of the United States, and operated to deprive him of his liberty without due process of law.

#### 1.—THE QUESTION OF JURISDICTION.

The jurisdiction of this court to inquire into the question thus raised is vindicated in the case of

Quin Bohanan vs. State of Nebraska, 118 U. S.  
231.

In that case immunity from a second trial for an offense of which the plaintiff in error insisted he had been acquitted was claimed by virtue of the 5th Amendment to the Constitution of the United States. The court said that having made the claim, and the ruling on it in the highest court of the state having been against him, the judgment was open to review here.

Whether one is protected by the 14th Amendment against being twice put in jeopardy for the same offense was considered by this court in

Dreyer vs. People of Illinois, 187 U. S. 71,

but was not decided. It was held in that case, on the authority of United States vs. Perez, 9 Wheat. 579, that the discharge of the jury on account of their inability to agree did not prevent a re-trial, nor operate as an acquittal, the record of the trial reciting that "the jury aforesaid being now returned into court and *being unable to agree upon a verdict*, are thereupon, by order of this court, discharged from further consideration of this cause."

The salient feature of this case is that no adjudication or record was made by the court that the jury was unable to agree, nor any that there was no reasonable probability that they would or could agree. The most the court could say was "that there is a reasonable probability that the jury cannot agree." Finding the condition contemplated in the statute, Section 2125, to exist, the jury was discharged and the right to put him on trial again is asserted by virtue of the provisions of Section 2126, as follows:

“In all cases where a jury is discharged or prevented from giving a verdict by reason of an accident or other cause, except where the defendant is discharged during the progress of the trial, or after the cause is submitted to them, the cause may be again tried.”

It is believed that the essential difference between the record in this case and that under consideration in the Dreyer case will require of this court a determination of the question as to whether the right not to be twice put in jeopardy is protected by the 14th Amendment.

**2.—IS THE RIGHT NOT TO BE TWICE PLACED IN JEOPARDY PROTECTED BY THE 14TH AMENDMENT?**

The view that the rights enumerated in the first eight amendments to the constitution of the United States, before the adoption of the 14th Amendment uniformly held to be limitations on the federal and not state authority, are such privileges and immunities of citizens of the United States as are protected by that amendment against adverse action by the states is, of course, contended for. It was ably set forth in opinions filed in the case of

**O'Neill vs. Vermont, 144 U. S. 323,**

but was rejected by this court in

**Maxwell vs. Dow, 176 U. S. 581.**

Touching that contention and the conclusion to be drawn from the consideration which the subject has received from this court, a late work says:

“The argument has frequently been advanced that the rights protected by the first eight amendments are such privileges and immunities; but though the

view has had distinguished advocates, the court has held otherwise and has asserted the true criterion to be the fundamental character of the right for which protection is claimed, so that some of the rights enumerated in the early amendments may be privileges and immunities of citizenship while others are not."

McGhee on Due Process, 34.

Commenting on the same argument another writer says:

"It depends on the nature of the right not on the fact that it is mentioned in those amendments."

Brannon on the 14th Amendment, 72.

Repeatedly this court has said in relation to the language of the amendment appealed to:

"The clause, therefore, means that there can be no proceeding against life, liberty or property which may result in deprivation of either without the observance of those general rules established in our system of jurisprudence for the security of private rights."

Hagar vs. Rec. Dist. 111 U. S. 701;

Hurtado vs. California, 110 U. S. 516;

Marchand vs. Penn. R. R., 153 U. S. 387.

The question in every case is as to whether the right is a fundamental one, one of "those general rules established in our system of jurisprudence for the security of private rights."

That in cases involving life or liberty at least there must be a "regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard." The right to appear and be

heard in judicial proceedings, to have notice, is conceded to be of such a fundamental character.

Likewise it has been held that "a statute which compels the litigant to submit his controversy to a tribunal of which his adversary is a member makes his antagonist his judge and does not afford due process of law."

*Com. vs. Smith*, 84 N. E. 376.

This case makes practical application of the maxim that no one should be judge in his own cause.

A case from the state of Ohio, and one from the state of Rhode Island afford further guides to the character of the fundamental rights that are secured from invasion by the amendment in question. The Ohio case,

*Hammond vs. State*, 84 N. E. 416, considered a statute of that state intended to suppress trusts, which provided that "the character of the trust or combination alleged may be established by proof of its general reputation as such." The act was held invalid because it permitted a conviction on hearsay and in effect deprived the defendant of the presumption of innocence, the court saying:

"This, we think, is not due process of law, but is violative of Section 1 of Article XIV of the Constitution of the United States."

The Rhode Island case,

*State vs. Kartz*, 13 R. I. 528, presented the same question. It considered a law making it an offense to keep a place reputed to be a place where intoxicating liquors are sold. Such a law it was held was

“so repugnant to the fundamental rules of our jurisprudence” as to be “violative of Section 1 of Article 14 of the Constitution of the United States.”

It has been twice at least held by the federal courts that the right not to be twice put in jeopardy for the same offense is of so fundamental a character as to be guarded by the 14th amendment.

In re Bennett, 84 Fed. 324;  
Ex parte Ulrich, 42 Fed. 587.

The question came before the court in *In re Bennett* on a state of facts similar to those presented in *Bohanan vs. Nebraska*. The petitioner had been convicted of a lesser offense embraced within a graver charge upon which he had been tried. The conviction had been set aside upon appeal, and upon a new trial he was convicted of the higher grade of the crime of which he claimed he had been acquitted by the first verdict. This contention Judge De Haven held was correct,—the matter coming before him upon habeas corpus proceedings founded upon the claim that the proceeding was in derogation of the process of law clause of the 14th Amendment. The learned judge maintained that they were clearly so, but held that a review must be had by writ of error to this court and not by habeas corpus.

It might be said here that the same question was involved in this case, the plaintiff in error contending that the verdict rendered on the first trial convicting him of murder in the second degree was an acquittal of the charge

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It might be said here that the same question was involved in this case, the plaintiff in error contending that the verdict rendered on the first trial convicting him of murder in the second degree was an acquittal of the charge

of murder in the first degree, which contention was sustained by the learned trial judge.

Instruction No. 53, Transcript, page 31.

The views of Judge De Haven on the question now under consideration were expressed in the following paragraph from the opinion in the Bennett case:

“The right of a person, after acquittal by a jury, to be exempt from the jeopardy of being again placed on trial in the same court, and upon the same indictment, for the identical offense of which he has been acquitted is certainly one of the fundamental rights which has always been recognized by our system of jurisprudence as belonging to the citizen; and, unquestionably, the guaranty of due process of law, found in the fourteenth amendment to the constitution of the United States, was intended, among other things, to secure to the citizen this right, and deprives the state of authority to convict and punish a person for a crime of which he has been duly acquitted by a jury, when the fact of such former acquittal is made to appear to the court before which he is again put in jeopardy for the same offense. *Ex parte Ulrich*, 42 Fed. 587. See, also, *Ex parte Lange*, 18 Wall. 163.

“The judgment of the court under which the petitioner is now imprisoned is in violation of the constitutional rights of the petitioner as thus defined, and, in my opinion, is void in the extreme sense. After the petitioner was acquitted of the higher offense charged in the information, the superior court of the county of Alameda had no jurisdiction to again place him upon trial for such offense, upon the same information, or to require him to enter any further plea in order to preserve his constitutional right of protection against a second trial for that offense; and, if there is any statute of the state which attempts to confer upon the courts of the state such a jurisdiction, it is, in so far as it attempts so to do, clearly repugnant to the provision of the fourteenth amendment to the constitution of the United States, before referred to, and therefore void.”

In that case an appeal had been taken to the Supreme Court of California from the judgment of conviction on the second trial, where it was affirmed for the reason that no plea of former jeopardy had been interposed.

People vs. Bennett, 114 Cal. 56.

Judge De Haven, however, held that it appearing by the record that the petitioner had been acquitted of the higher grade of offense on the first trial, the court was bound to take judicial notice of the fact without any plea, and that the record showed the judgment to be void because rendered contrary to the petitioner's fundamental constitutional rights.

The case of *Ex parte Ulrich* is not only directly in point on the question now being considered, but is a direct authority upon another feature of the case in holding that an improper discharge of the jury before they shall have rendered a verdict, a discharge where no necessity for such action exists, operates as an acquittal of the defendant, and is as effectual to prevent a re-trial as would a verdict of "Not Guilty" be.

In that case Judge Phillips of the United States District Court for the Western District of Missouri, released on habeas corpus a prisoner who had been convicted upon a second trial, the jury impaneled on the first trial having been discharged without sufficient reason for such action, as the court held.

Whether such a proceeding was forbidden by the 14th Amendment was elaborately considered by the learned judge, who reached the conclusion that the right not to be

placed twice in jeopardy for the same offense is "imbedded in the very bone-work of our political and judicial system;" he declared that

"We will find no principle of the common law, grounded upon the great rock of the *Magna Charta*, more firmly rooted than that no man shall be twice vexed with prosecutions for the same offense;"

and added:

"As expressive of how deeply rooted this principle of the common law has ever been in the minds and convictions of the American people, as their common, inestimable, heritage of liberty from the institutions and usages of the mother country, the colonists, long before the adoption of the constitution, incorporated the provision respecting due process of law, or the law of the land, in all their local governments; and there has not been a constitution, state or federal, adopted on this continent, which does not contain the provision against double trials and punishments, or punishments after acquittal."

Ex parte Ulrich, 42 Fed. 590-591.

He quoted, to sustain the views expressed by him, the following language of Mr. Justice Miller, used in

Ex parte Lange, 18 Wall. 163:

"If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. \* \* \* The principle finds expression in more than one form in the maxims of the common law. \* \* \* In the criminal law the same principle, more directly applicable, \* \* \* is expressed in the Latin, '*nemo bis punitur pro eodem delicto*,' or as Coke has it, '*nemo debet bis puniri pro uno delicto*.' \* \* \* The common law not only prohibited a second punishment for the same offense, but it went further, and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted."

The following from

Com. vs. Olds, 5 Litt. (Ky.) 137:

"Every person acquainted with the history of governments must know that state trials have been employed as a formidable engine in the hands of a dominant administration. \* \* \* To prevent these mischiefs the ancient common law, as well as *Magna Charta* itself, provided that one acquittal or conviction should satisfy the law, or, in other words, that the accused should always have the right secured to him of availing himself of the pleas of *autrefois acquit* and *autrefois convict*. To perpetuate this wise rule, so favorable and necessary to the liberty of the citizen in a government like ours, so frequently subject to changes in popular feeling and sentiment, was the design of introducing into our constitutions the clause in question."

And the following from

State vs. Cooper, 13 N. J. Law, 361:

"Our courts of justice have recognized and acted upon it as one of the most valuable principles of the common law without any constitutional provision. \* \* \* And all who are conversant with courts of justice \* \* \* must be satisfied that this great principle forms one of the strong bulwarks of liberty." He considered the case of

Hurtado vs. California, 110 U. S. 516,

in which this court held that it was within the power of the state to abolish the grand jury system and substitute prosecutions by information, which had been appealed to in opposition to the application for the writ, and showed that nothing therein said would lead to the belief that the right claimed by the petitioner to have been invaded was not of a fundamental character and so protected by the requirement of due process of law. The learned judge en-

tertained no doubt that it was, nor that the action of the court in discharging the jury before a verdict was returned—no necessity for such a course appearing—was in effect an acquittal.

Though it was afterwards held in this case by the Circuit Court of Appeals that the review must be by error and not by habeas corpus, the reasoning of the opinion on the merits has never been successfully assailed. In

*Ex parte Nielson*, 131 U. S. 176,

this court declared the right not to be twice put in jeopardy to be fundamental, saying, with reference to the petitioner in that case;

“He was protected by a constitutional provision, securing to him a fundamental right.”

The particular amendment referred to was undoubtedly the 5th, operative because the court before which the conviction in that case was had, being a territorial court, was subject to its provisions. But the court did not content itself with speaking of the shield of the constitution. It referred to the right which had been expressly guaranteed by the constitutional provision as “fundamental,” an expression that has particular significance, not so much because it has been frequently used in discussions of the subject since the later decisions of this court, to characterize those rights which are not subject to destruction or impairment, by reason of the 14th Amendment, but because of the views expressed in the opinions filed in the *Hurtado* case. In the dissenting opinion of Mr. Justice Harlan it is said, “My brethren concede that there are principles of

liberty and justice, lying at the foundation of our civil and political institutions, which no state can violate consistently with that due process of law required by the 14th Amendment in proceedings invoking life, liberty and property."

This statement of the learned Justice of the views expressed by his brethren is fully justified by the following language from the opinion in

*Brown vs. Comrs.*, 50 Miss. 468,

quoted by Mr. Justice Mathews, speaking for the court:

"The principle does not demand that the laws existing at any point of time shall be irrevocable, or that any forms of remedies shall necessarily continue. It refers to certain *fundamental* rights which that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty or property, then the deprivation has not been by 'due process of law.' "

The thought embodied in this quotation was the governing idea in the decision in the *Hurtado* case. The "general maxims of liberty and justice" which came to us with the common law, it was declared, "must be held to guaranty not particular forms of procedure, but the very substance of individual rights, to life, liberty and property."

The question in that case being as to the validity of a change in the method of procedure and it being considered that by the method sanctioned by the new law, reasonable security for the preservation of the fundamental rights of the accused were provided, it was held that such procedure was "due process of law."

So in *Maxwell vs. Dow*, the question was as to the validity of a change in procedure, a state statute providing for trial by a jury of eight in criminal cases not capital being under investigation.

The right not to be placed twice in jeopardy for the same offense is essentially different in character from a claim demanding adherence to ancient and revered methods of procedure. It is rather of the "substance of original justice," which must be guarded and insured in any change in procedure which the wisdom of the passing years may suggest.

But the declaration of this court in the *Nielsen* case to the effect that the right is a "*fundamental*" one has added significance in view of the oft quoted language of Mr. Justice Washington,

*Corfield vs. Coryell*, Fed. Cas. 3230,

referred to in *Maxwell vs. Dow*, in which, speaking of the clause in Section 2 of Article IV of the Constitution of the United States, to the effect that "the citizens in each state shall be entitled to all the privileges and immunities of citizens of the several states," he said:

"We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature *fundamental*; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent, and sovereign. What these *fundamental* principles are it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government, the enjoyment of life and liberty with the right to acquire and possess



property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."

Maxwell vs. Dow, 176 U. S. 588.

In the opinion of Lush, J. in

Wemyss vs. Hopkins, L. R. 10 Q. B. 378,

quoted in

Kepner vs. United States, 195 U. S. 127,

that learned jurist says:

"I am also of opinion that the second conviction should be quashed, upon the ground that it violated a *fundamental* principle of law, that no person shall be prosecuted twice for the same offense."

The right under consideration is said to be "a part of the universal law of reason, justice, and conscience."

17 Am. & Eng. Ency. of Law, 581.

"It is embodied in a maxim of the civil law and is embedded in the every elements of the common law."

Id.

Speaking of the incorporation in the English law of that maxim that no person should be put in jeopardy a second time for the same offense, Mr. Justice McLean said it "was so strongly recommended by the principles of justice that no intelligent people could resist it."

U. S. vs. Keen, 1 McLean, 429, Fed. Cas. No. 15,510.

"It is a principle founded in obvious justice."

Note to People vs. McDaniels, 92 Am. St. Rep. 93.

It can scarcely admit of doubt that it is one of those "general rules established in our system of jurisprudence

for the security of private rights," which no state can disregard or annul,—a right protected by the 14th amendment against infringement by any branch of a state government.

### 3.—EXTENT OF THE RIGHT.

If, then, the 14th Amendment forbids that one be twice put in jeopardy for the same offense, it becomes the duty of this court to determine and declare when and under what circumstances the right is invaded.

The Supreme Court of Montana holds in the judgment to be reviewed that nothing short of a *verdict of acquittal or conviction* will bar a second trial of a defendant, and it holds that the statute of Montana, Section 1356, permits a re-trial in every case in which the first trial did not result in a verdict of conviction or acquittal.

Transcript, page 102.

The statute in question reads as follows:

"No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted."

So construing the statute, and this court must adopt the construction given it by the state court, it unquestionably offends against the 14th Amendment in permitting a re-trial of a defendant in a case where on the first trial the jury was improperly discharged by the court.

The learned Chief Justice of the Supreme Court of Montana declined to subscribe to this view of the law expressed by the majority of the court.

Transcript, pages 104, 118.

The overwhelming weight of authority is against the view expressed in the opinion of the Supreme Court of Montana, and no case is cited in support of the position it takes. If it has correctly construed the statute, the court should have held it void. The law as all but universally held is expressed in the following:

“Jeopardy begins when the jury is impaneled and sworn for the trial of a valid indictment in a court of competent jurisdiction, and if the trial be thereafter terminated without verdict by the discharge of the jury in an improper manner, or otherwise than for a manifest necessity, accused cannot be again put on trial for the same offense. Failing to object to illegal discharge of jury does not prevent accused from availing himself of the jeopardy.”

7 Current Law, 1013.

This question was involved in

Ex parte Ulrich, 42 Fed. 587,

in which case it will be remembered the jury was discharged without a verdict. The opinion refers to many cases in which the rule as above expressed is laid down.

The elementary works lay down the rule in substantially the same terms.

Cooley on Const. Lim. 399 (6th Ed.);  
1 Bishop on Crim. Law, 1016 (5th Ed.);  
1 Bishop's Crim. Proc. 821;  
12 Cyc. 269-270.

The work last cited thus states the rule:

“If the jury are discharged for a reason legally insufficient and without absolute necessity for it, *the discharge is equivalent to an acquittal*, and may be pleaded as a bar to a subsequent indictment.”

The text is supported by reference to decisions from nearly half the states of the Union. An elaborate note to the case of

State vs. McKee, 21 Am. Dec. 490,  
refers to many cases holding similarly. No effort will be made to collate all the cases.

A multitude of them will be found in

Note 8 to 17 Am. & Eng. Ency. of Law, 1261,  
in support of the following text:

“It is generally agreed that the discharge of the jury in a criminal case, in the absence of circumstances rendering it proper for the court to exercise a discretion in that behalf, will operate as an acquittal of the defendant.”

Another long list is appended to enforce the view expressed by the Supreme Court of California in

People vs. Webb, 38 Cal. 467-468,  
the opinion in which is commended by

People vs. Hunckeler, 48 Cal. 331-334.

Indeed the position taken by the Supreme Court of Montana that the plea of former jeopardy is available only after a verdict and not in any case when the jury is discharged during the trial, was declared by this court in

Kepner vs. United States, 195 U. S. 100-128,  
to be against the weight of authority. The following is the language of Mr. Justice Day, speaking for the court:

“It is true that some of the definitions given by the text-book writers, and found in the reports, limit jeopardy to a second prosecution after verdict by a jury; but the weight of authority, as well as decisions of this court, have sanctioned the rule that a person has been in jeopardy when he is regularly charged

with a crime before a tribunal properly organized and competent to try him; certainly so after acquittal. *Coleman v. Tennessee*, 97 U. S. 509, 24 L. ed. 1118."

The view taken by the Supreme Court of Montana that a defendant has been but once in jeopardy, however often he may have been tried for the same offense, had found expression in the dissenting opinion of Mr. Justice Holmes in the case last above referred to.

It would seem that the very fact that the learned justice specified particular cases in which the defendant might be tried a second time, would lead quite reasonably to the conclusion that in certain cases the discharge of the jury without their having rendered a verdict would preclude trying him again. It might be observed that no cases were included in the category in which the prosecution was dismissed, after the taking of evidence began, on motion of the state, or where for his own convenience the judge dismissed the jury and continued the cause, or where he discharged the jury under any circumstances, not regarded in the law as justifying such a course. The cases compiled illustrate conditions in which the rule is inapplicable rather than militate against the rule that a wrongful—that is an unwarranted—discharge of the jury amounts to an acquittal and is as effective to support a plea of former jeopardy as is a verdict of not guilty.

*State vs. Nelson*, 61 Am. St. Rep., 780.

Where the defendant expressly consents to the discharge of the jury, or asks that the verdict be set aside and a new trial granted, he is, of course, estopped to plead former jeopardy.

Some very recent decisions in conformity with the opinion of the majority of the court, as counsel for the plaintiff in error understands it, are the following:

Bagwell vs. State, 58 S. E. 650;  
State vs. Richardson, 35 L. R. A. 238.

#### 4.—WAS THE JURY PROPERLY DISCHARGED?

If, then, the discharge of the jury for a reason legally insufficient precludes his being put upon trial again, it will be necessary to inquire as to the sufficiency of the reason for the discharge of the jury in this case.

Upon the second trial of the defendant, the jury was discharged and an entry made as follows:

“In this cause the jury returned this day into open court, the defendant being present in person, and by counsel; whereupon it satisfactorily appearing to the court that there is a reasonable probability that the jury can not agree, court ordered the jury discharged from further consideration of this cause.  
\* \* \*

Transcript, pages 83-84.

It will be observed that this entry follows the language of Section 2125 of the Penal Code of Montana in its recital of the condition in view of which the jury was excused. The plaintiff in error presents that the condition recited in the order is not such as warranted the discharge of the jury, notwithstanding the language of the statute, and that a re-trial of the plaintiff in error, after the discharge of the jury, under the circumstances recited in the order, is an invasion of the right guaranteed to him by Section 18, Article III of the constitution of the State of Montana, not to be twice put in jeopardy for the same offense; and that a

re-trial of the plaintiff in error under the circumstances operates to deprive him of his liberty, contrary to the provisions of Section 27, Article III of the constitution of the State of Montana, and of Section 1 of the 14th Amendment to the constitution of the United States.

The statute above referred to is an innovation in the criminal law of this country. Chapter III, Title VII, of Part II of the Penal Code of Montana, being Sections 2120 to 2127 inclusive, is taken, as is the entire code of criminal procedure of the State of Montana, speaking generally, from the Penal Code of the State of California, the sections last referred to being identical with Sections 1135 to 1142 of the California Penal Code, except that the language "it satisfactorily appears that there is reasonable probability that the jury cannot agree," found in our Section 2125, is as follows in their Section 1140: "it satisfactorily appears that there is no reasonable probability that the jury can agree."

It scarcely requires argument to convince even a casual reader that there is a wide and substantial difference between these two statutes. Indeed, they express ideas that are at opposite poles in the realm of probabilities as to a disagreement. A reasonable probability that the jury cannot agree implies simply a preponderance in favor of that conclusion. It implies equally that there still remain chances that the jury will eventually be able to agree, though the chances are against it. It does not exclude the idea of a reasonable hope of agreement. On the contrary when it can be said that "there is no reasonable probability that

the jury can agree" every reasonable probability of an agreement is gone, every reasonable hope has vanished. The difference between the two expressions may be, perhaps, made clear to any to whom it might seem obscure, by taking the case of two men who are ill. The attending physician answers an anxious inquirer with respect to "A" that there is a reasonable probability that he cannot get well. With respect to "B" he says there is no reasonable probability that he can get well. It is evident that he still hopes for the recovery of A; that he has by no means given up, that he feels, probably, that the chances are against him, and that he runs some risk, perhaps even a great deal of risk, of dying, but that by good fortune and careful attention he may survive. His language with reference to B indicates that all hope is gone. His recovery would be a miracle not looked for, and not to be expected.

It might be illustrated further by reference to the rule of proof in a criminal case. If a trial court should instruct a jury to the effect that they should find a verdict against the defendant if they believed that there is a reasonable probability of his guilt, the judgment would have to be reversed. It is only where there is no reasonable probability of his innocence that a verdict of guilty is justified. A reasonable probability of the man's guilt of the crime is a vastly different thing from there being no reasonable probability of his innocence.

Or, perhaps the very best method of illustrating the important difference between the two expressions is by as-



saming the case of the jury returning into court and being interrogated as to the probability of their reaching a verdict. If the foreman, on being interrogated by the court, should say "there is a reasonable probability that we shall not be able to agree," the court would immediately be prompted to answer, "Well, it is quite apparent that all hope of your agreement is not gone. You evidently believe that there is still some chance of your being able to agree, upon further consideration." On the contrary, if he answered, "There is no reasonable probability that we shall ever be able to agree" further debate would simply be useless. The very language of the first answer supposed carries with it a suggestion that upon further consideration an understanding might be arrived at. The latter answer clearly indicates the hopelessness of further discussion.

Of course, the order must be taken as it stands. It must be deemed that the court, after having made careful inquiry, was able to reach simply the conclusion that there was a probability that the jury could not agree. He was not able to satisfy himself, it must be assumed, that every reasonable hope, every fair expectancy of an agreement was gone, but simply that the chances were rather against their agreeing, if they should be sent out again.

No effort is made to impeach the record made at the time. No claim is made that upon further inquiry it would have been revealed that an agreement was imminent. The plaintiff in error stands upon the record as it was

made. He insists that it does not disclose a condition warranting the jury's discharge.

The record presents the question as to whether a discharge of the jury, under such circumstances, will warrant a re-trial, and that raises for consideration the question as to the circumstances and conditions under which a jury may be discharged for failure to agree, without such discharge operating as an acquittal.

When the meaning and effect of the constitutional provisions providing that no person should twice be put in jeopardy for the same offense first came before the courts of this country for consideration, it was held in quite a few instances that if a jury disagreed, the defendant was entitled to his discharge, because to put him on trial a second time, under such circumstances, would be violative of the constitutional guaranty. Decisions to this effect were made in Pennsylvania, Virginia and the Carolinas. Later decisions in these states repudiated this rule, and they now conform, practically, to the decisions in the states generally, holding that the inability of the jury to agree, is such a necessity as warrants the discharge of the jury and permits the re-trial of the defendant.

12 Cyc. 273, Par. 14;

11 Am. & Eng. Ency. of Law, 1st Ed. 953;

17 Am. & Eng. Ency. of Law, 2nd Ed., 1254-1255.

The rule now generally accepted is that a re-trial may be had "if by any overruling necessity the jury are discharged without a verdict."

4 Am. & Eng. Ency. of Law, 1st Ed. 797.

Such overruling necessity exists if the term comes to an end before the trial is finished, or if the judge or some member of the jury should die or become so seriously ill as to be unable to proceed with the cause. So, also, the defendant is held not to have been in jeopardy "if the jury is discharged after considering the cause for such a length of time as to leave no reasonable expectation that they will be able to agree upon a verdict." Necessity is the only justification for the discharge of the jury, and the authorities hold that where "there is no reasonable expectation that they will be able to agree, such a condition of affairs constitutes absolute and urgent necessity, and justifies the court in discharging the jury."

12 Cyc. 273.

With a view to express the extremity which must be arrived at before the court will be warranted in discharging a jury, the courts have not contented themselves with saying even that a necessity must arise, but they have used qualifying terms intended to indicate that such a condition must exist as renders that course the only one practicable at all. Thus in

Ex parte Glenn, 111 Fed. 257-261,  
it is said that a discharge except under an "*imperious* necessity will operate as an acquittal." The same qualifying adjective to describe the character of the necessity which will warrant such action is used in the opinion in

McCorkle vs. State, 14 Ind. 39.

In

State vs. Allen, 54 Pac. 1060,

it is said that an "*absolute necessity*" must exist. An "*overruling necessity*" is the way it is expressed in

Helm vs. State, 6 So. 322, and in  
Ex parte Maxwell, 11 Nev. 435.

In

State vs. Callendine, 8 Ind. 288,  
the necessity for the discharge of the jury must be, it is  
said, "*peremptory and controlling.*"

The result of a discharge, except under circumstances  
such as are indicated above, is expressed in the following  
extract from the opinion in

Ex parte Glenn, *supra*.

"I reach the conclusion that if the court discharges a jury in a capital or felony case without the consent of the prisoner, and without imperious necessity, such action entitles the prisoner to a final discharge from further trial or prosecution. See 1 Bish. Cr. Proc. Par. 821; 2 Am. Cr. Law, Par. 576; Com. v. Cook, 9 Am. Dec. 472; State v. McKee, 21 Am. Dec. 506, note; Mahala v. State, 31 Am. Dec. 591; in re Ah Jow (C. C.) 29 Fed. 182; Com. v. Andrews, 3 Mass. 126; Ex parte Royall, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868."

It is generally held also that to warrant a second trial of the defendant, after a discharge of the jury, the record must show the necessity for the prior discharge.

1 Bishop's Crim. Law, 837;  
17 Am. & Eng. Ency. of Law, 1255 (2d Ed.);  
People vs. Gage, 48 Cal. 326-327;  
State vs. Schuchardt, 25 N. W. 722;  
Upchurch vs. State, 44 L. R. A. 694-699;  
State vs. Nelson, 61 Am. St. Rep. 780, 19 R. I. 467.

In the opinion in the case of State vs. Schuchardt, the Supreme Court of Nebraska quotes the following from the

opinion in

Dobbins vs. State, 14 Ohio St. 499.

"Counsel for the plaintiff very justly and necessarily concede that a case of necessity may exist which would legally justify the course taken in this instance, but they insist that such a case can only arise when some intervening impediment has necessarily stopped the progress of the first trial before verdict; that the power of discharging a jury in a criminal, and, especially in a capital case, is a delicate and highly responsible trust, to be exercised on account of the disagreement of the jury only when they have deliberated so long as to preclude all reasonable expectation that they will ever agree upon a verdict without being compelled to do so from famine or exhaustion; that this power does not rest upon the arbitrary or uncontrollable discretion of the judge presiding at the trial, but is a legal discretion, to be exercised in conformity with known and established rules; and, finally, *that unless the facts stated in the record clearly established a case of necessity, the discharge will operate as an acquittal of the accused, and preclude his further prosecution.*" And then adds:

"Abating something from the claim made as to what must of necessity affirmatively appear in the record, we have no hesitation in yielding to these propositions our entire assent; and they are certainly very strongly supported by the cases cited in argument. Hurley's Case, 6 Ohio, 402; Mount v. State, 14 Ohio, 304; Poage v. State, 3 Ohio St. 238; McKee's Case, 1 Bailey, 651; U. S. v. Perez, 9 Wheat. 580; People v. Goodwin, 18 Johns. 187; People v. Olcott, 2 Johns. Cas. 301; U. S. v. Coolridge, 2 Gall. 364; People v. Barrett, 2 Caines, 304.

"Where the jury are discharged for any of the causes stated in section 475 of the Criminal Code, the record must show the necessity which required their discharge; otherwise the defendant will be entitled to an acquittal. Hines v. State, 24 Ohio St. 134; Poage v. State, 3 Ohio St. 229; Hurley v. State, 6 Ohio, 400; Mount v. State, 14 Ohio, 295. This was not done in this case."

In *Upchurch vs. State*, the following from *Wright vs. State*, 35 Tex. Crim. Rep. 158, is quoted with approval:

*"The record informs us simply that the court discharged the jury. We are left to inference as to the reasons prompting him to this action. There should have been a judgment of the court finding and declaring that the jury had been kept together such a length of time as to render it altogether improbable that they could agree."*

In

*Ex parte Maxwell*, 11 Nev. 428-437, the record stated that the jury "retired in charge of the sheriff, duly sworn, and subsequently returned into court, and, by their foreman, stated that they were unable to agree upon a verdict, whereupon the court discharged the jury from further consideration of the case." The court held that this record did not warrant a subsequent trial of the defendant, commenting upon it as follows:

*"Now for what reason were the jury thus discharged? The record is silent as to the length of time the jury were out, but it is clear that there was no necessity for their discharge in consequence of its having been so near the end of the term (as limited by the statute), as to preclude further deliberation on the part of the jury, because the ensuing term did not commence until the first Monday (3d) of April. Was it, then, because the court was satisfied that the jury had deliberated a sufficient and proper length of time, and there was no reasonable probability of their being able to agree upon a further deliberation? The record does not so state; nor does it appear that the court so adjudged. The only ground appearing was that the foreman of the jury stated that 'they were unable to agree upon a verdict.' This was clearly insufficient, and was no ground for the exercise of that 'delicate and highly important trust that only exists in cases of extreme and absolute necessity.' The court may have been satisfied that the jury were unable to*

agree upon a verdict, and that there was no reasonable probability of their doing so upon further consultation and deliberation. But these were essential facts, the existence of which ought to be determined by the court and established by the record. And as the record fails to establish the existence of such facts and such determination, it follows that the discharge of the jury was an illegal exercise of power on the part of the court.

"We are, therefore, of opinion that the prisoner has been once put in jeopardy within the meaning of the constitutional provision under consideration, and that the discharge of the jury, under the circumstances disclosed by the record, was equivalent to a verdict of acquittal."

In

State vs. Allen, 54 Pac. 1060,

the entry was as follows:

"The jury not having agreed upon a verdict in the above entitled cause, the jury is discharged from further consideration of this case."

The failure to record the facts showing the necessity for the discharge was held to operate as an acquittal of the defendant. In the opinion in

State vs. Klauer, 78 Pac. 802,

it is said to have been held in

State vs. Smith, 24 Pac. 84,

"that the record ought to show affirmatively the existence of the facts which induced the court to exercise the extraordinary power of discharging the jury, in order that the constitutional rights of the accused may be preserved."

In the case of State vs. Allen, above referred to, the court, after reviewing the authorities, said:

"It results from these cases that before a court may discharge a jury to which has been submitted the question of the guilt or innocence of the accused, and

especially in capital cases, there must exist—First, an absolute necessity for such discharge; second, the court must make inquiry, and find and determine that such necessity existed at the time of the discharge; and, third, the essential facts as to such necessity, and the finding of the court thereon, must be made a matter of record, or the defendant may successfully plead former jeopardy when placed on trial on the same charge. *Dobbins v. State*, 14 Ohio St. 493; *Hines v. State*, 24 Ohio St. 134; *Ex parte Maxwell*, 11 Nev. 436; *State v. Reinhart*, 26 Or. 466, 38 Pac. 822; *People v. Smalling*, 94 Cal. 112, 29 Pac. 421; *Conklin v. State*, 25 Neb. 784, 41 N. W. 788; *State v. Leunig*, 42 Ind. 541; *State v. Jefferson*, 66 N. C. 309; *State v. Pool*, 4 Lea. 363.”

In *State vs. Nelson*, *supra*, the court said:

“The defendant had the right to a judicial finding upon the question of the necessity for dismissing the first jury, and, in the absence of it, to a discharge.”

The necessity for a record showing an adjudication of the necessity for the discharge is thus expressed in

17 Am. & Eng. Ency. of Law, 593:

“Though in general jeopardy begins when the jury has been impaneled and sworn, yet, if afterwards and before a verdict has been reached, some unforeseen circumstance arises which renders it impossible for the trial to proceed to a verdict or for a valid verdict to be rendered, the jury may be discharged, *the facts of the case having been adjudged and the judgment recorded*, and the defendant may be again put on trial for the same offense.”

By Bishop, in the following language:

“The better view of this whole question may be stated as follows: Whenever, after a trial has commenced, whether for misdemeanor or for felony, the judge discovers any imperfection which will render a verdict against the defendant either void, or voidable by him, he may stop the trial, and what has been done will be no impediment in the way of any future



proceedings. Whenever, also, anything appears showing plainly that a verdict cannot be reached within the time assigned by law for the holding of the court, he may adjudge this fact to exist; and, on making the adjudication matter of record, stop the trial, with the like result as before. *But, without the adjudication, the stopping of the trial operates to discharge the prisoner.* In other words, when the record shows the defendant to have been in actual jeopardy, he is protected thereby from further peril for the same alleged offense. But when it shows also, in addition to this, something which disproves the peril, it does not show the peril, whatever else it shows, and therefore it does not protect him."

1 Bishop's Crim. Law, (5th Ed.) Sec. 1036.

The rules laid down in the authorities to which we have adverted are not such as depend in any manner whatever upon statutory provisions. They are principles which have been worked out by the courts, as following from the constitutional right of a defendant not to be twice put in jeopardy for the same offense. In recognition of the principles so announced and the construction of the constitutional provision referred to, by the courts, statutes have been passed in many states declaratory of the law authorizing the discharge of a jury for failure to agree. With scarcely an exception they embody the idea expressed in the California statute that there is no warrant for the discharge of the jury until there is no longer any reasonable probability that the jury can agree, that all reasonable hope and expectancy of a verdict have vanished.

The language of the California statutes is that most commonly observed. It is found in the Idaho statute, Penal Code of Idaho, sec. 5488; in the North Dakota stat-

ute, Revised Code of 1899 (Code Crim. Proc. sec. 386); South Dakota, Code Crim. Proc. sec. 394, (Rev. Codes, 1903); in that of Arizona, Revised Statutes of 1901, Penal Code, sec. 963; and Nevada, Compiled Statutes of Nevada, 1900, secs. 4361-4362. The Indiana statute is as follows:

"The jury may be discharged by the court, on account of the sickness of a juror, or other accident or calamity requiring the discharge, or by consent of both parties, or until after they have been kept together until it satisfactorily appears that there is no probability of their agreeing."

Burns Anno. Ind. Stat. (1894) Sec. 551.

The Ohio statute is identical with that of Indiana.

Bates' Anno. Ohio Stat., Sec. 5195 (4th Ed.)

Wyoming appears to have copied the language of the statutes of the two states last named.

Revised Statutes of Wyoming, 1899, Sec. 3649.

The Nebraska statute has the same origin, apparently, and follows the same language.

Compiled Statutes of Nebraska, Sec. 1272.

The same is the case with that of Kansas. See statute quoted in

State vs. Smith, 24 Pac. 84.

Washington has the same statute.

Ballinger's Anno. Codes and Stat. of Washington, Sec. 5006.

The Oregon statute is likewise substantially identical, being as follows:

"Except as provided in sections 138 and 148, or in case of some accident or calamity requiring their

discharge, the jury shall not be discharged after the cause is submitted to them until they have agreed upon a verdict and given it in open court, or unless by the consent of both parties entered in the journal, or unless at the expiration of such period as the court may deem proper it satisfactorily appears that there is no probability of an agreement."

Ballinger & Cotton's Anno. Codes & Stat. of Oregon, Sec. 145.

So likewise is the Iowa law.

Code of Iowa, Sec. 3714. (1897.)

The Arkansas statute provides that the jury must be kept out until "it satisfactorily appears that there is no probability that they can agree."

Digest of Stat. of Arkansas, 1894, Sec. 2242.

The Texas statute reads:

"The jury may be discharged after the cause is submitted to them when they cannot agree, and both parties consent to their discharge, or where they have been kept together for such time as to render it altogether improbable they can agree; in the latter case the court, in its discretion, may discharge them."

Penal Code, 1897, Art. 739.

It might be noted as an exceedingly significant fact that every western state, whose codes of procedure are founded upon those of the State of California, except Montana, namely, Nevada, Idaho, North Dakota, South Dakota, as well as the territory of Arizona, has followed, with reference to the subject under consideration, the very language of the California law. Why it was that in framing the Montana code of criminal procedure, the legislature felt called upon, while following the language of the Penal

Code of California quite generally, to deviate from it at this point, there seems to be no foundation even for a guess. No similar statute has been discovered, after an exhaustive research, in any legislation in any of the states upon this subject. A consideration of them as a whole reveals how universally is entertained the idea that a second trial of a defendant is not justified unless on the former trial the jury were unable to reach a verdict, and every reasonable expectancy that they would do so was gone.

No direct adjudication upon the question now presented to the court has been found among the decided cases, for the very plain reason that no state has ever attempted to pass a statute, apparently, of similar import; and for the reason, probably, that it was recognized that such a statute would be alike against public policy and contrary to the constitutional rights of the defendant in a criminal case; or, rather, that a discharge under such circumstances would prevent the re-trial of the defendant.

It must be concluded, upon reflection, that it would be unwise, as well as unfair to a defendant to place in the hands of the court the power to discharge a jury whenever he thought there was a probability that they were going to disagree.

In this case it will be observed by the record that the court did not find that the jury could not agree, and did not find even that there was no reasonable probability that they could agree. He simply believed that there was a probability that a disagreement would be the result of their deliberations. The force of this finding is in no way

altered or changed by the use of the word "reasonable." The California statute would doubtless be construed as meaning exactly the same if the word "reasonable" were omitted from it, and it read, "until it satisfactorily appears that there is no probability that the jury can agree." Undoubtedly the court would hold that that meant no reasonable probability, if, indeed, there can be deemed to be any difference whatever between a reasonable and an unreasonable probability, or if there can exist such a thing as an unreasonable probability.

It must be conceded that Section 2125 of the Penal Code authorizes the court, after a jury has been out five minutes, to call them in and discharge them if he believes there is a probability that the jury cannot agree; and this he might do in the honest and conscientious discharge of his duty.

In nine cases out of ten, stoutly contested, some reasonable man might very justly entertain the opinion that the jury would disagree, and though others who with him heard the evidence might disagree with him as to such a result, probably few or any of them would be prepared to assert that such an outcome was not a reasonable probability.

It must be acknowledged by all that this statute vests in the court a power to discharge the jury under circumstances never heretofore accorded by any statute, and when the occasion for the establishment in the English law of the principle embodied in the constitutional guaranty is taken into consideration, it will appear at once that it

was intended to take away from the court the power to discharge, under the circumstances mentioned in the statute, or at least to make a discharge, under the circumstances, operate as an acquittal of the defendant.

The principle had its origin in the English law, like so many of the liberties we prize, out of the attempts of the Crown to prosecute and punish for alleged offenses of a political nature. Under the English system, where the judge held by appointment from the Crown, it was not at all unheard of in the days of more or less arbitrary power in the sovereign, for judges, at a hint from the government representatives, to discharge, on some trivial pretext, a jury which the Crown representatives thought would be likely to acquit the defendant, and hold him to answer before another jury which might be more tractable or obsequious; or, if the defendant happened to be a favorite of the Crown, to let the jury go, in the hope that he might stand a better show of acquittal when again brought to the bar.

Upchurch vs. State, 44 L. R. A. 694-699.

It was out of abuses of this character that the principle developed.

It is not uncommonly, perhaps it might be said that it is usually the case, that the judge and the prosecuting officer belong to the same political party, and it might well be apprehended that for that or other reasons, judges might, at times, be disposed to abet the unwarranted zeal of the prosecuting officer. It is no answer to say that such conditions are not at all likely to arise; that it must

be presumed that judges and prosecuting officers will do their duty and will deal justly and fairly with those whom they are called upon to prosecute or try. Undoubtedly it must be so presumed. The presumption is a very strong one, and it must be said to the credit of the officers of the law, and the judges of our criminal courts, that it is rare indeed that the presumption is not realized in fact; but it is equally undeniable that instances do occur where judges become prosecutors, and forget the duty they owe to defendants on trial before them, or even regard their judicial duty as demanding action in violation of the law and of the constitutional rights of the defendant. It is because these rare instances do actually occur that constitutional guaranties are needed at all. Many constitutional guaranties would be entirely needless if judges always did what is right, equitable and just.

The plaintiff in error in this case, we maintain, had a clear constitutional right to have the jury who heard the evidence against him at the trial presided over by Judge Clements continue in its deliberations on the same, and in the effort to arrive at a verdict thereunder, not only until there was a probability that they could not agree, or a reasonable probability that they could not agree, or even, for the matter of that, a *strong* probability that they could not agree, but until every hope or expectancy of their arriving at a verdict was gone; in short, until there was no longer any reasonable probability that they would agree.

Having then, in effect, been acquitted of the crime charged, by the discharge of the jury by Judge Clements,

the further proceedings against him were in contravention of the 14th Amendment to the Constitution of the United States.

The replication to the plea of former jeopardy asserts that no objection was made by the plaintiff in error to the discharge of the jury on the second trial. But this mere silence, particularly when he was not asked as to whether he had any objection, is not to be deemed a waiver on his part of a fundamental right. The point has been frequently ruled on.

Ex parte Glenn, 111 Fed. 257-258;  
State vs. Richardson, 35 L. R. A. 238;  
12 Cyc. 271-272;  
Allen vs. State, 41 So. 593;  
People vs. Arnett, 129 Cal. 306, 61 Pac. 930;  
Bagwell vs. State, 129 Ga. 170, 58 S. E. 650;  
Jones vs. State, 97 Ala. 77, 12 So. 274;  
Ex parte Maxwell, 11 Nev. 428;  
Com. vs. Fitzpatrick, 121 Pa. St. 109;  
Williams vs. Com., 44 Am. Dec. 403;  
Ingram vs. State, 124 Ga. 448, 52 S. E. 759.

It should be ordered, accordingly, that the judgment of the Supreme Court of Montana be reversed, and that the plaintiff in error be discharged.

THOMAS J. WALSH,  
CORNELIUS B. NOLAN,  
Attorneys for Plaintiff in Error.



213 U. S. 135.

**IN THE  
Supreme Court of the United States**

**OCTOBER TERM, 1908.**

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**JAMES S. KEERL,**

**Plaintiff in Error,**

**vs.**

**THE STATE OF MONTANA.**

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**IN ERROR TO THE SUPREME COURT OF THE  
STATE OF MONTANA.**

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**BRIEF OF THE STATE OF MONTANA.**

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We understand that the only question involved in this case, if this court determines that a Federal question is involved, is:

Was Plaintiff in Error twice placed in jeopardy of life or limb for the offense of Murder, or Manslaughter, by reason of his last trial and which resulted in his conviction of Manslaughter.

The original information in this case was filed in Lewis and Clark County on April 24th, 1902, charging Plaintiff in Error with the crime of Murder. (Tr. 34.)

Thereafter at a trial had in the district court of said county before the Honorable Henry C. Smith, Judge thereof, Plaintiff in Error was on June 3rd, 1903, convicted of Murder in the Second Degree. (Tr. 76).

Thereafter Plaintiff in Error appealed to the Supreme Court of the State of Montana from the "judgment finding him guilty of Murder in the Second Degree." The Supreme Court reversed the judgment and remanded the cause for a new trial on the ground, among others, that the information did not state a cause of action.

State vs. Keerl, 29 Mont. 508; 85 Pac. Rep. 862.

The case on being remanded to the district court came up for trial June 23, 1904, before the Honorable J. M. Clements, one of the judges thereof who on June 25th, 1904, denied the application of the State to amend the original information. (Tr. 78.) At this trial the jury failed to agree and were discharged on July 14th, 1904. (Tr. 83).

The case came up for trial before the Hon. Henry C. Smith, one of the Judges of said district court who on July 21st, 1904, permitted the information to be amended. (Tr. 1.) The case was then on the application of the plaintiff in error transferred for trial to the 8th Judicial District of said State before the Hon. J. B. Leslie, Judge thereof, before whom a third trial was had, resulting on June 23rd, 1905, in a conviction of Manslaughter. (Tr. 18.)

From this judgment of conviction an appeal was on June 27th, 1905, taken to the Supreme Court of the State of Montana by Plaintiff in Error (Tr. 98) and the judgment there affirmed. (Tr. 100-115).



The foregoing statement is practically the brief and argument on behalf of the State of Montana. The information was not amended until after the second trial. It cannot be contended that the first trial of the plaintiff in error operates as a bar to the subsequent trial or that it constitutes a jeopardy, for an appeal from that judgment was taken by plaintiff in error and the judgment reversed at his instance.

Trono vs. U. S., 199 U. S. 521.

And the second trial of plaintiff in error where it was claimed he was put in separate jeopardy was had on the original information, which was so defective that it would not support any judgment of conviction for either murder or any degree thereof, including Manslaughter. The Supreme Court of Montana in passing upon the sufficiency of this original information said:

"The second point urged presents more difficulty. After alleging the infliction of certain mortal wounds, the information continues, 'of which said mortal wounds the said Thomas Crystal did then and there languish, and languishing did live, and thereafter, on the 21st day of April, A. D. 1902, at the County of Lewis and Clark, in the State of Montana, the said Thomas Crystal died.'

An information must be direct and certain as regards the party charged, the offense charged, and the particular circumstances of the offense charged, when they are necessary to constitute a complete offense. (Penal Code, Sec. 1834.)

It is not permissible to convict the defendant upon mere inferences; he must be directly, plainly and specifically charged with the commission of a certain crime, and it must be proved substantially as alleged in order to convict him. In order to convict an accused of murder, the fact of the killing by him as

alleged must be proved beyond a reasonable doubt. (Penal Code, Sec. 358.) The fact that the defendant inflicted upon another human being a mortal wound deliberately, premeditatedly, with malice aforethought, and with the intent to kill the victim is not sufficient to substantiate the charge of murder. The victim must die of the mortal wound, and within a year and a day after the stroke is received or the cause of death administered (Penal Code, Sec. 357). If the victim die of the mortal wound, but after a year and a day have elapsed since its infliction, the defendant may not be convicted of either murder or manslaughter. Neither can he be so convicted if, while the victim is languishing because of the mortal wound, death ensues from some cause not connected with or a consequence of the wound. For these reasons the information should directly allege that death resulted from the mortal wounds inflicted by the defendant. This view being so clearly correct in principle, it would seem that no citation of authorities is necessary, but see Clark on Criminal Procedure, 178; *People vs. Lloyd*, 9 Cal. 55; *Commonwealth vs. Macloon*, 101 Mass. 1, 100 Am. Dec. 89; *State vs. Sundheimer*, 93 Mo. 311, 6 S. W. 52; *Maxwell's Criminal Procedure*, 180; *Bishop's New Criminal Procedure*, Secs. 527, 531, 532; *Wharton's Criminal Law* (10th Ed.) Sec. 536.

In *Lutz vs. Commonwealth*, 29 Pa. 441, while an indictment containing language similar to the one at bar was sustained the court say: 'This indictment is not artistically expressed. Its grammatical construction is open to criticism, and it trenches hard on those rules of certainty which obtain in criminal pleading.'

The attorney general relies on the concluding clause of the information as supplying the defect, because it alleges 'and so the said James S. Keerl did in the manner and form aforesaid wilfully, unlawfully, feloniously and of his deliberately premeditated malice aforethought kill and murder the said Thomas Crystal.' These words are the mere conclusion drawn from the preceding averments. If the averments are bad, the conclusion will not aid them; if they are good, and sufficiently describe the crime as the law requires

• • • the formal concluding words are immater-

ial. (Ter. vs. Young, 5 Mont. 244; 5 Pac. 248; State vs. Northup, 13 Mont. 522; 35 Pac. 228).

We cannot give our approval to this information. As this case must go back for a new trial, the information may be amended by leave of the court to conform to the views herein expressed."

State vs. Keerl, 29 Mont. 511.

This decision of the Montana court as to the insufficiency of this information is well sustained by the authorities therein cited. The State of Montana maintains that an indictment or information too defective to support a judgment will not support a jeopardy.

"When the indictment is in form so defective that, supposing the defendant to be found guilty by the jury, he will still be entitled to have any judgment which may be entered of record against him reversed, he is not in jeopardy, and, if acquitted, is liable to be tried on a new and valid indictment. The author, in support of this proposition, cites many precedents, extending from Hale's Pleas of the Crown to the most recent declarations of courts upon this subject. State vs. Gill, 33 Ark. 129, 1 Crim. Law Mag. 665; Hosier vs. State, Id. 124. When a defendant has been convicted an appeal taken, and a new trial awarded, the case dismissed, and a second bill of indictment found, a plea of former jeopardy will not avail. Simco v. State, (Tex. App.) 2 Crim. Law Mag. 26 et seq. This is true when the judgment is arrested for apparent defects. State v. Sherburne, 58 N. H. 535; Smith vs. Com., (Pa.) 5 Crim. Law Mag. 615. The Supreme Court of Mississippi, in the case of Kohlheimer v. State, 39 Miss. 548, 77 Amer. Dec. 689, an exceedingly well reasoned case, announces this conclusion: 'It seems to be clear, therefore, upon principle as well as authority, that neither at common law, nor by our constitution will an acquittal or conviction, when the penalty has not been inflicted, upon a void proceeding or indictment, operate as a bar to a subsequent indictment for the same offense.'"

**United States v. Jones, 31 Fed. 728.**

The Kohlheimer case above quoted, contains a very exhaustive discussion of the principles here contended for and cites a great many cases both English and American in support thereof.

In *United States vs. Shoemaker*, 2 McLean's Reps. (U. S.) 114, in construing a case similar to the one at bar, the court seemed to take it for granted that a valid indictment was necessary to sustain a jeopardy and decided the case upon that theory.

"Jeopardy attaches where a party is once placed upon trial before a competent court and jury upon a valid indictment to which he cannot be again subjected unless the jury be discharged from rendering a verdict by a legal necessity, or by his consent, or in case a verdict is rendered it be set aside at his instance. (*People vs. Webb*, 38 Cal. 467; and many subsequent cases cited). The information here was not a valid information and there was no jeopardy."

*People vs. Ammerman*, 118 Cal. 26.

"There must have been a sufficient accusation on a former prosecution, otherwise the court could have no jurisdiction. If, therefore, the indictment was insufficient \* \* \* because it was so defective in form or substance that a conviction upon it could not have been sustained, an acquittal upon it could not be pleaded."

*Clark's Crim. Proc.* 389; citing many cases.

See also *State vs. Smith*, 55 N. W. (Iowa) 198, at page 200.

*State vs. Meekins*, 6 So. Rep. (La.) 822.

*Prichett vs. State*, 2 Sneed (Tenn.) 285 at page 290.

*Western vs. State*, 63 Ala. 156.

17 Am. & Eng. Ency. Law (2nd Ed.) 584.

12 Cyc. 261.

In the Encyclopedias above referred to, cases are cited from almost every state in the Union sustaining the principles here contended for. At said second trial no verdict of any kind was reached nor was any penalty imposed on plaintiff in error. Hence the doctrine laid down by this court in *U. S. vs. Ball*, 163 U. S. 662, cannot apply.

The plea of former jeopardy interposed by plaintiff in error at his third trial was for the offense of murder in the first degree (Tr. 5) and it cannot now be maintained that defendant should be liberated from his conviction of manslaughter on the ground that the information on which he was tried may have been sufficient to sustain a conviction for some other offense. The only other offense that the information, by any possible construction, included was that of assault, and assault is not a degree of murder or manslaughter. It is a separate and distinct offense, and a conviction or acquittal would not bar a prosecution of murder in any degree, including manslaughter. And if this information prior to amendment charged only assault it was so amended prior to the third trial of defendant as to charge the crime of murder, and it is on this last or amended information that plaintiff in error was convicted.

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Again, with reference to the time the jury had the case under consideration the transcript discloses the following facts:

"Done in open court this 11th day of July, 1904  
 \* \* \*. Thereupon court read its instruction to the  
 jury. Whereupon respective counsel addressed the  
 jury \* \* \*."

Tr. page 83.

“Done in open court this 12th day of July, 1904. The trial of this cause was this day resumed; present defendant in person and by counsel, the county attorney, associate counsel for the State, and the jury. Whereupon respective counsel concluded their arguments to the jury and said jury retired in charge of a sworn officer to deliberate upon their verdict.

Tr. page 83.

“Done in open court this 14th day of July, 1904. In this cause the jury returned this day into open court, the defendant being present in person and by counsel. Whereupon it satisfactorily appearing to the court that there is reasonable probability that the jury cannot agree, the court ordered the jury discharged from further consideration of this case. \* \* \*.”

Tr. 83.

The transcript does not set out at what hour of the 12th of July the case was given to the jury, nor on what hour of the 14th, the jury was discharged, but if the case was submitted to the jury at 6 o'clock on the evening of the 12th of July, and the jury was discharged at 10 o'clock on the morning of July 14th, a period of forty hours intervened. This computation of time gives the plaintiff in error the benefit of all doubt. But if the argument of counsel did not consume all of the two days of the 11th and 12th of July, 1904, or if the jury were not discharged until after 10 o'clock on the 14th, then the case was held by the jury for more than forty hours.

The fact alone that the jury have been in retirement for forty hours or more without reaching a verdict is, *of itself*, sufficient ground for the discharge of the jury by the presiding judge in the sound exercise of his discretion.



"The plea of former jeopardy was rightly held bad. It averred that the discharge of the jury at the former trial without the defendant's consent was by the court, of its own motion, and after the jury, having been in retirement to consider their verdict for forty hours, had announced in open court that they were unable to agree as to these defendants. The further averment that 'there existed in law or fact no emergency or hurry for the discharge of said jury, nor was said discharge demanded for the ends of public justice' is an allegation, not so much of specific and traversable fact, as of inference and opinion, which cannot control the effect of the facts previously alleged. Upon those facts, whether the discharge of the jury was manifestly necessary in order to prevent defeat of the ends of public justice, was a question to be finally decided by the presiding judge in the sound exercise of his discretion. (*United States v. Perez*, 9 Wheat. 579; *Simmons v. United States*, 142 U. S. 148.)

*Logan vs. U. S.*, 144 U. S. 297-298.

See also:

*Dreyer vs. Ill.*, 187 U. S. 71, at pages 85 and 86.

*Thompson vs. U. S.*, 155 U. S. 271, at page 274.

*Simmons vs. U. S.*, 142 U. S. 148, at page 154.

*U. S. vs. Perez*, 9 Wheat. 579.

*Ex parte Lange*, 18 Wall. 163, 165.

"The discharge of a jury in a criminal case because of their inability to agree upon a verdict after a protracted deliberation does not entitle the defendant to his discharge on the ground that he has been once in jeopardy." (*Syllabus*.)

*State vs. Nelson*, 26 Ind. 366.

"The discharge of a jury in a criminal case without agreeing on a verdict is a matter resting in the sound discretion of the court in which the trial is had.

*People vs. Green*, 13 Wend. (N. Y.) 57.

The record does not show just what independent inquiry was made by the court or what statements were made by

the jury to the court as to the probabaility or improbability of an agreement by the jury, it simply there recites that "whereupon it satisfactorily appearing to the court that there is a reasonable probability that the jury cannot agree," etc. This necessarily implies an investigation sufficient to satisfy the court, and the law presumes "that official duty has been regularly performed."

Subdiv. 15, Sec. 3266 Code Civ. Procedure.

"The reasons upon which the court deems it proper to discharge the jury are not required to be placed on record; it is sufficient that it shows the jury were unable to agree. The judge is not bound to take as final the statement of the jury that they cannot agree upon a verdict, but when such statement is made the court below, familiar with the nature of the evidence, and probably the temperaments of the men who compose the jury, is better qualified to say whether there is a reasonable probability of an agreement than the appellate court; certainly the latter ought not to interfere with the ruling except in cases of clear abuse of discretion. (*People vs. Smalling*, 94 Cal. 115.)

*People vs. Greene*, 100 Cal. 140, at page 142.

The burden is upon the plaintiff in error to show that the record of the discharge of the jury sustains the defense of plea of former jeopardy.

*State vs. Pianfetti*, 79 Vt. 236.

*O'Connor vs. State*, 28 Tex. App. 288.

*State vs. Heath*, 8 Mo. App. 99.

*People vs. Trimble*, 67 N. Y. 364.

9 Ency. Pleading and Practice, 637.

And the plaintiff in error cannot alter the record by inserting an allegation in his plea of former jeopardy that the jury simply reported that they "had not agreed." He

must affirmatively show facts by the record that will justify the court or jury in sustaining his plea. The only proof or offer to show this in the case at bar was the record, and the record does not show, either affirmatively or otherwise, the presence of such facts.

“The defendant is not entitled to impeach the record by extrinsic evidence of facts showing an erroneous exercise of judicial discretion in discharging the jury.”

People vs. Smalling, 94 Cal. 116.

The fact that the record shows that the jury were out at least forty hours and then returned into court without a verdict is sufficient of itself to justify the court in discharging it.

Logan vs. U. S., 144 U. S. 297.

And the fact that the jury *was discharged* after coming into court and making its report shows that the court *was satisfied* that the jury could not agree. The court first satisfied itself that a legal necessity existed for the discharge of the jury and then perfunctorily used the words of the statute in the minute entry regarding the action of the court in making the discharge.

The necessity for the discharge of the jury must have been first determined upon or the jury would not have been discharged at all, and the form of the words employed is wholly immaterial. The “jeopardy” is not bottomed upon a mere formula of words, but upon the facts and circumstances from which the court reached the conclusion that a necessity existed for the discharge of the jury. We

are not able to distinguish any difference in the practical meaning between the clause "it satisfactorily appearing to the court that there is no reasonable probability of the jury agreeing" and the clause "it satisfactory appearing to the court that there is a reasonable probability that the jury cannot agree." For both must rest upon sound discretion of the court and this discretion must be based upon the facts and conditions appearing at the time the order of discharge is made.

Many cases may be cited based upon statutes worded differently from said Section 2125 of the Penal Code of Montana, in stating the grounds upon which the court in the exercise of its discretion may discharge the jury without consent of the parties. The language used by the courts in citing and discussing such statutes merely follows that of the statute considered. Such cases do not, however, hold that the wording of said Section 2125 is not sufficient in an order of a court discharging a jury. Nor do such cases conflict with the law as laid down in *Logan vs. U. S.* and *Dreyer vs. Ill.*, cited above, to the effect that the discharge of the jury for failure to agree is a matter resting in the sound discretion of the court. The decision of the Supreme Court of Montana appearing in the transcript at pages 100 and 115 appears to us to be based upon sound reasoning and is a construction by the highest court of the State of a State statute.

The learned Chief Justice of the Supreme Court of the State of Montana did not disagree with the majority of the court as to the correctness of the conclusions reached

relative to the questions presented by the appeal (Tr. 104), and the State does not here contend that an acquittal or conviction is *always* necessary to sustain a plea of former jeopardy. No such question is presented by this appeal, for here there was neither an acquittal nor a conviction. There was no verdict at all.

Nor is there any question presented here as to whether it would be an abuse of discretion for the trial court to order the discharge "after the jury has been out five minutes" (brief of plaintiff in error 39) for the transcript here affirmatively shows that the jury had been deliberating upon this case for at least forty hours, and that is sufficient.

Logan vs. U. S., *Supra*.

And this fact sufficiently shows that a necessity did exist for the discharge of the jury, for it certainly cannot be contended that it is the duty of the trial court to hold the jury until some members of the jury have surrendered their candid convictions and in order to secure their discharge have consented to a verdict which did not meet the approval of their judgment. And if, as apparently contended for by counsel the words used by the court in discharging the jury are absolutely conclusive the defendant would always be at the mercy of the court, for the court could very easily use the formula approved by counsel, even though the jury had been deliberating only five minutes.

We have not in this brief discussed the question of jurisdiction for the reason that the State of Montana stands

upon the merits of the controversy and maintains that the plaintiff in error never was placed in second jeopardy.

We respectfully submit that the judgment of the Honorable Supreme Court of the State of Montana should be affirmed.

ALBERT J. GALEN,

Attorney General.

W. H. POORMAN,

Assistant Attorney General.

E. M. HALL,

Assistant Attorney General.

Attorneys for the State of Montana.

Twining v. State of New Jersey, 29 Sup. Ct. Rep. 14.  
Maxwell v. Dow, 176 U. S. 581.







39 Mont. 374-382.  
102 Pac. 981-984.

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IN THE  
**Supreme Court**  
OF THE  
**STATE OF MONTANA**

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JOSEPH E. SMITH AND THE RIVERSIDE  
LAND AND LIVE STOCK COMPANY,  
Plaintiffs and Respondents,

VS.

A. T. DUFF, et al.,  
Defendants and Respondents,  
HOSSFELD AGRICULTURAL AND STOCK  
RAISING COMPANY, et al.,  
Defendants and Appellants.

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BRIEF OF APPELLANTS.

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I.

STATEMENT OF CASE.

This is a water right suit and in this appeal the parties interested are the appellants Hossfeld Agricultural and Stockraising Company, the Smith heirs and Ed Hossfeld, and the respondents Blondell, Massa and Rothfus.

The appellants are given a right dependent, it might be truthfully said, entirely upon the output of what is known as the Willow Swamp canal, in a joint ditch, of 512 inches of water, appropriated on the first of May, 1885, divided in the following proportions: 128 inches to Ed Hossfeld, 128 inches to the Smith heirs, and 256 inches to the Hossfeld Company.

Transcript, page 215, Par. 19.

The ditch is the last one on the creek, a circumstance in itself not much to be envied, as it has become almost axiomatic in water controversies that a late right at the head of a creek is much better than an old right at the mouth. Be that as it may, by the decree there is an '85 right given to the appellants of 512 inches and to the respondents a right of 400 inches is given, with the date of appropriation fixed at 1872, and also a right of 160 inches of developed water, good as against all claims, these amounts being ratably apportioned as follows: one-fifth to Massa, one-fifth to Blondell and three-fifths to Rothfus.

The only question presented by this appeal is whether the evidence sustains the finding giving these rights to the respondents named, and although the record is voluminous, unnecessarily so as it seems to us, we will present the portions of the pleadings that are material to be considered, and invite the court's attention to the portions of the record likewise material to be considered.

The answer of Rothfus appears at page 36, and in the cross-complaint, commencing at page 39, he sets up the fact that he is now and has been since the first day of May, 1870, in the possession and actual occupancy of about 400 acres of land, and that the only available supply of water for the irrigation of 320 acres of that land is the output of this Willow Swamp; that on the first day of May, 1870, the grantors and predecessors of Rothfus, Massa and the Conrad-Stanford Company appropriated 400 inches of water for the irrigation of all of the lands described, and also for the irrigation of lands belonging to the predecessors in interest of the corporation and Massa, and in this manner the appropriation of 400 inches of water was made. That thereafter, until 1903, the water thus appropriated was used upon the premises for which the same was appropriated. This is followed by the allegation that the grantors and predecessors of Rothfus, at a date not named (it might be said no inkling was ever furnished as to such date), constructed a dam, and water was taken to irrigate 360 acres of land in Section 27, Township 5 North of Range 1 East, and that the water thus appropriated has been used ever since. All of this appears in paragraphs 1, 4, 5 and 6 of the Rothfus cross-complaint.

Transcript, pages 39 to 43.

The answer of Massa appears at page 151, and in his cross-complaint, commencing at page 151, he states that he is the owner of 240 acres of land, and

that the Willow Swamp canal furnished a constant and unfailing supply of 400 inches of water, and that in 1870 his grantors and predecessors in interest, together with the grantors and predecessors in interest of Rothfus and Blondell, appropriated this water for agricultural purposes, and that the water was conveyed upon the premises and used continuously thereon until 1903, when they were interfered with.

Transcript, pages 151 to 155.

The answer of Blondell is practically the same as those of his associates.

If there is any pleading anywhere alleging a right on account of developed water, we have been unable to find same. We submit that there ought to be a pleading of some character on which to base this finding which gives to these respondents 160 inches of water.

The answer and cross-complaint of the appellants appears at page 73 of the transcript, where it is alleged that the appropriation was made by them in 1885 for the irrigation of lands described, it being claimed that the appropriation as made was 1000 inches.

The case was tried to the court without a jury,

Transcript, page 231,

and a stipulation was entered into in open court as follows:

"It shall be deemed that one inch of water per acre is essential and sufficient for the irri-

gation of an acre and such amount shall be awarded unless the testimony shows that a greater or less quantity is essential or sufficient. It is also further agreed that all of the affirmative allegations of answers filed are deemed denied by all the parties without filing pleadings so denying the same; the full meaning of the pleadings shall be deemed controverted by all parties without the necessity of replies or whatever pleading an answer to an answer would be."

Transcript, page 233.

Upon the submission of the evidence findings were requested and appellants requested that a finding should be made as to the right in controversy, that it should post-date appellants' right, and also that no right should be awarded on account of developed water.

Transcript, page 301.

Findings were made as hereinabove set forth, and on the 11th day of June, 1907, a notice of intention to move for a new trial was served and filed. This notice was given for and in behalf of all of the parties represented by Mr. Nolan upon the trial.

Transcript, page 227.

Afterwards there was a withdrawal of appearance by the gentleman named for all of those in behalf of whom the notice was given, other than the appellants here and David Williams and James Kitto. Mr. Goodman entered an appearance for those theretofore represented by Mr. Nolan, and in behalf of those for whom Mr. Goodman entered an

appearance there was a dismissal of the motion for a new trial. The motion for a new trial in behalf of the appellants was then presented,

Transcript, pages 304 to 307,

which motion was overruled,

Transcript, page 310,

and this appeal is taken from the order overruling the motion for a new trial, and from the judgment.

Transcript, page 311.

The evidence on which the findings complained of are based is found in the record,

Transcript, pages 234 to 300,

and as it will be referred to and quoted at some length in the argument, we refrain from inserting it here.

## II.

### ERRORS OF LAW.

1. The court erred in finding for the respondents as follows:

“That the defendants Joseph Massa, Seth Blondell and John Rothfus are the owners of, entitled to the use of and to use 400 inches of the waters of Willow Swamp, a tributary of Crow Creek, for the irrigation of their lands, appropriated on the first day of May, 1872. That of said appropriation said Joseph Massa owns an undivided one-fifth thereof, said Seth Blondell owning an undivided one-fifth

thereof, and said John Rothfus owning an undivided three-fifths thereof; and also said defendants, in the proportion just named, are the owners of and entitled to the use of, and to use 160 inches of the waters of said swamp as against every other party to this suit, by reason of water developed by said defendants by the drainage of said Willow Swamp by the Willow Swamp canal."

Transcript, pages 219-220.

2. The court erred in rendering judgment in favor of the respondents for the quantity of water named.

3. The court erred in overruling appellants' motion for a new trial.

### III.

#### ARGUMENT.

The evidence on which this finding is predicated fails hopelessly in quantity and in character to warrant the finding as made.

Mr. Thorpe, the engineer who prepared the maps, testified as to the capacity of the ditch. His testimony had to do with a period not earlier than August, 1906.

*Mr. Macomber* testified substantially as follows:

"I know the farms of Seth Blondell, John Rothfus and Joseph Massa; the Blondell farm is known as the Doherty farm; the Willow Swamp canal was constructed by Henry McFarlane, Doherty and George Beatty. Doherty was not interested at the time of the con-

struction, but bought in afterwards. The work was commenced in 1872, in the spring. At the time that this canal was constructed, Mr. George P. Ross had a ditch out, and it was absorbed by the making of the canal. Ross was using his ditch for irrigation of the land known as the Ross land.

"The witness then tells about the measuring of water from the swamp running in the canal, and stated that the first measurement was made in September, 1895, when there were found 324 inches flowing in the canal; that the next measurement was made in October, 1896, and the quatity then flowing was found to be 513 inches. The witness stated that Massa succeeded to the McFarlane interest, that he did not know who succeeded to the Beatty interest, but that Meyers got an interest and likewise Mr. Doherty. The ditch was constructed for mining; the mining claims were down on the Missouri river and the claims have not been worked for several years; that they were not worked a great while. George Beatty had no land on which to use the water; McFarlane had a little ranch. I am not positive whether he had it at that time that he used this water on it. I could not say when this water was first used for agricultural purposes. Mr. Ross had used his interest for agriculture before the ditch was enlarged; I could not say when the water was first used upon the places where it is now used. I would say it was commenced to be used as early as 1880, but I would not say positive as to that either. There were a couple of pretty good rains before the second measurement was made, and atfer there is a rain the swamp shows the effects of it. I could not tell whether the difference in the two measurements was due to work done or due to rain; there was a natural channel running through the swamp before they made this cut."

Transcript, pages 240-252.

*George P. Ross.*

"I know the Willow Swamp canal; Bob



George and Henry McFarlane and I think Austin built the canal, and a man by the name of Beatty had a hand in it too. McFarlane had a garden on the river and he had a cut around above the ditch and got the water to his garden. The water was used, as it seems to me, only one summer. The gold was fine and they couldn't save it, and they quit mining. The canal tapped the creek at my dam. I had a ditch that ran to a timothy piece of land on the south-east quarter of 30, the Rothfus land now. I took out my ditch in 1871.

Q. Then what became of the ditch that you constructed, taking the swamp waters at the time of making the Willow Swamp canal?

A. They told me there was no water there for them when I wanted it, and the ditch would hold all the water they wanted, and they run around and carried their water up a little higher, and they ran around the ditch; when I did not need the water, to turn it loose and let it go. They didn't claim any water. There was no one to interfere with that. They wanted the surplus water in the spring and in the fall after the irrigation was done.

After the making of the canal I used the water right along, and they used it ever since and ran it around by Benham's."

Transcript, pages 252-256.

The witness then told about working in the swamp and increasing the flow in 1879 and 1880.

Transcript, page 257.

"The place I owned in 1871 is now owned by Rothfus.

Transcript, page 258.

Up to the time that I commenced getting water through the canal, I irrigated the garden and ten or twelve acres that I was using at that time.

Transcript, page 258.

There was not very much water there, and in fact I had difficulty in getting water sufficient to irrigate the 15-acre tract and the garden. There was some people intersted with me in the ditch when I built it in '71, but I bought the ranches they were interested in, so that I had it all, and after getting it all I did not have enough to irrigate 15 acres.

Transcript, page 260.

McFarlane was the only one that had any garden, and used the water for irrigating.

Transcript, page 262.

He had a little strip of ground about ten or fifteen acres, but he could not get water to it.

Transcript, page 262.

After the completion of the Willow Swamp canal in '74 and '75, the only water that was used at the time for irrigating, was the water that I would use up above and the water that McFarlane would use down below. After 1875 the greatest acreage I had in one year was 80 acres.

Transcript, page 265.

Q. At the time of building the canal, they built it for the purpose of getting high water in the spring and the water in the fall after the irrigating?

A. That is what I said; that was three or four years after they quit the mines.

Q. At any rate, that was the purpose of building the canal, the high water in the spring and the water after they stopped irrigating?

A. That is what they told me.

Q. And as a matter of fact, in the building of the canal, they did not claim water when it was needed for the irrigation of lands above?

A. No, I used the water whenever I wanted it, and turned it loose when I did not need it.

Q. The mining they did was mining they

did when the supply of water was available in the spring, and after they stopped irrigating, also in the fall?

A. Yes sir.

Q. Well, has Rothfus got all of your place, the lower place so-called, or do you still own that?

A. There was 80 acres belonging to my son that he didn't get."

Transcript, pages 265-266.

*Frank Shull* testified that he knew Henry McFarlane, and that his interest in the ditch went to his brother in Dakota, and that he succeeded him, and that he sold that interest to Joseph Massa.

Transcript, pages 272-273.

*Joseph Massa* testified as follows:

"The canal receives its water from the Willow Swamp; I know the lands in the north-west quarter of Section 32, and the north half of the north-east quarter of Section 31, and I irrigate from the Willow Swamp canal three forties in the northwest quarter of Section 32. I own a one-fifth interest in the canal; I bought a quarter interest, but we made an agreement with the company, we would make five shares in the ditch; the Ross farm acquired one-fifth and the farm belonging to Meyers acquired a fifth and the Doherty farm received a fifth.

Transcript, pages 275-276.

I was an owner in the canal at the time of the running of the lateral ditch into the swamp, and it increased the flow about one-half. We started that ditch on the 8th of October, 1895, and completed it on the 13th day of September, 1896.

Transcript, page 276.

I went on the place in 1886; at that time I did not need any water for the place, and I did not have any water for the place until 1893, when I purchased an interest in the canal from Mr. Shull; Mr. Shull was running the water on the McFarlane place, but there were only 10 or 12 acres that he was using the water on.

Transcript, page 282.

The witness then told about the work on the swamp in 1896, about running a cut through the swamp, or more correctly speaking deepening the cut already in existence."

This was in substance all of the evidence that was introduced to establish these rights, except that it was agreed that Blondell now holds, or assumes to hold, the right of J. E. Doherty.

In the deraignment of title it appears that John E. Doherty obtained title to 160 acres of land in 1888, and that this land is now owned by Seth Blondell. That it passed into the possession of Eugene T. Wilson, as receiver, and the Conrad-Stanford Company, and Evangeline Little and Walter H. Little, before getting into the possession of Blondell.

That as to the Massa property, a patent was issued to him for the North-west quarter of Section 32, in May, 1893, and there is likewise title shown to the North-east quarter of Section 32, through a purchase made from the Northern Pacific Railway Company in April, 1899.

As to the Rothfus holdings, we have an ownership established in him to the South-east quarter of Section 29, through R. F. May, Edgar G. Barrett,

James H. Gallop, Alonzo Pease and George P. Ross, and so on as to all the land described in his complaint, making an aggregate of 1500 or 1600 acres.

We have some definite information as to the Willow Swamp canal. It appears at page 291 of the transcript. Seemingly an undivided half interest was sold to William Hall in 1875. Hall sold a quarter interest to James Davis in 1879. There is a deed from William Hamilton to William Davis of a half interest, in 1884, and a deed from Davis and wife to William Myers of a half interest in the Willow Swamp ditch in 1884.

Transcript, page 291.

This is all of the evidence respecting these rights, except some slight rebuttal evidence as to the increase of the swamp through the work done in 1895, the witness testifying that the work done did not tend to increase the output of the same.

Testimony of Jos. E. Smith, page 292.

On this evidence 400 inches of water were given to this Willow Swamp canal ditch; one-fifth of this is given to Massa, one-fifth to Blondell and three-fifths to Rothfus, and in addition to this 160 inches are given the ditch on account of development work in the swamp in 1895.

When the evidence in this case was presented, so clearly insufficient, as we contend, to sustain a claim for a water right on account of this ditch, as against agricultural claimants, no evidence what-

soever was introduced in rebuttal. Indeed, the witness Smith was not placed on the stand at the instance of the appellants, although appellants are the only ones who are affected by this finding giving these rights.

Appellants are given a right of 512 inches as of the first of May, 1885. From this supply—Willow Swamp—Johnson and Thomas are given a right of 200 inches and Laura Ross is given a right of 87 inches, all prior to the right given to the appellants, so that it is needless to say except during high water the right of appellants is entirely a paper one.

Let us analyze this evidence in the light of this proof.

A right of 400 inches is given for agricultural purposes on account of the construction of the ditch in 1872 by McFarlane and others. The only evidence at all that the record contains regarding this ditch is the evidence of George Ross, which is indefinite to say the least, but there is one feature that stands out clearly on the facts, that the ditch was constructed to carry on mining operations on the Missouri River, these mining operations to be carried on in the fall and in the spring, and that there was no pretense to claim the water as against its use for agricultural purposes; that it was only when there was no need for the water for agricultural purposes that the owners of this ditch claimed the right to use the water.

Seemingly, under the proof, the witness Ross had

a small ditch from which water was taken to the garden, and when the water was available it was taken around upon the timothy patch of fifteen acres. When the canal was constructed, the water was then taken through the canal and an interest in some way was acquired. How much and what disposition was finally made of same is left entirely to conjecture, whether Rothfus secured it, or whether it got into the possession of somebody else, and is left undisposed of, no one, from the examination of this testimony, can intelligently tell. Likewise, it seems that the mining operations did not prove successful, owing to the fineness of the gold, and that they were only conducted for a season. McFarlane, however, used the water upon a garden patch when he could get it, and this interest of McFarlane passed, so it would seem, through his brother and Shull to Massa. Shull was upon the stand; he was in the possession of the water, so it would seem, for about a year, but there is no evidence worthy of the name that the water was used to the extent of eighty inches, or to any extent from the time that the mining project proved a failure until Massa acquired the water and commenced to use it in 1896.

This is the basis of the Massa right of eighty inches, to be used by him at all times and at all seasons.

The Blondell right is even more shadowy. The only proof that we have at all in reference to this is

the agreement that Blondell assumes to hold the Doherty one-fifth. Who is Doherty? Was this water ever used by him? If so, where? There is something in the testimony of Massa that in some division that was made at some time, in which interests were divided into fifths, that Doherty was given a fifth interest. Did he have use for this water? If so, where? Really, there is nothing to show a change of purpose from that evinced when the canal was constructed, that it was a right which was to be used when the water was not needed for agricultural purposes. The chain of title shows that Doherty got title to 160 acres of land in 1888, and that this land passed into the possession of E. T. Wilson, as receiver, into the possession of the Conrad-Stanford Company, into the possession of Evangeline Little and Walter H. Little, before it passed into the possession of Blondell. Little was one of the litigants and undoubtedly he could tell whether there was a water right or not. The Conrad-Stanford Company could probably tell whether, during its possession of the premises, any water was used or claimed by it. This record furnishes no evidence whatsoever of any use of the water. Indeed, Blondell himself does not condescend to tell anything about it.

There is evidence, as shown by the map, that water was used upon the premises at the time that the survey was made by the engineer who prepared the map. We might sometimes be warranted in in-



dulging in the presumption that existing conditions continue, but we do not believe that for the establishment of water rights the presumption can be indulged in that land now under cultivation was cultivated from time immemorial. But to be serious, however, the giving of this right to the Willow Swamp renders valueless much of the landed possessions of the appellants, and this right is given on the proof that we are in this manner outlining.

But, we submit, weaker still is the testimony which gave to Rothfus 240 inches. Rothfus is owning about 1600 or 1700 acres of land in Crow Creek valley, and the basis of his claim is the George Ross interest in the ditch. But did the right which George Ross initiated to irrigate 15 acres and a garden patch go to Rothfus? The testimony at page 266 of the record justifies a conclusion at variance with this claim. But even if it did, and it also showed that this right was used and kept alive, we submit that a right of twenty-five inches would be in excess of what the proof would show was appropriated and used.

We have been fair in the discussion of this evidence and we have been fair in the presentation of it, and await with considerable interest its discussion by the learned gentleman who represented respondents, who was so successful in resurrecting a canal that for a quarter of a century had lain in blissful repose, unmindful of its usefulness.

We submit that, on the proof, no right should be

given to this canal for agricultural purposes and that the right as given should be subordinate to that of appellants.

We refrain from discussing the proposition as to the developed right of 160 inches. There is evidence to show that a large swamp exists which produces the water which is the subject of the controversy here, and that long before the work of 1895 was performed there was a cut made through the swamp for the purpose of providing an easy flow for the water. This, in a measure, was obstructed, and the work of 1895 and 1896 was directed to deepening that cut and removing those obstructions. Measurements were made before this work was commenced, and a short time after its completion, and the difference in the flow was shown. The gentleman who made the measurement could not say whether this was due to the fact that the increased output was developed water, or whether it was due to the rains which had fallen a short time before. In a matter of this kind, before a right of this character is given, the proof should be clear and convincing that through the work done the water was developed. In this instance the proof is not of such a character as to warrant a finding that any water whatsoever was developed, and none should be given.

Having in mind the evidence, we will respectfully call the court's attention to the legal principles

which apply in the consideration of the facts above set forth.

To constitute a valid appropriation of water, three elements must always exist. First, the intent to apply to some beneficial use, existing at the time or contemplated in the future; Second, a diversion from the natural channel by means of a ditch, canal or other structure; and Third, an application of it within a reasonable time, to some beneficial industry.

Nev. Ditch Co. vs. Bennett, 60 Am. St. Rep.  
802, (extended note);  
Lowe vs. Riser, 25 Or. 551.

The first of the elements essential to a valid appropriation of water is an intent to apply to some beneficial use, existing at the time or contemplated in the future. This intent must exist at the time of the diversion of the water and must be an intent that it shall be applied to a beneficial use.

Nev. Ditch Co. vs. Bennett, 60 Am. St. Rep.  
803.

A man may divert more water than is necessary for domestic and culinary purposes, and permit the excess to flow on down to his lands, but if he has no intention of using such excess to irrigate the land upon which the excess so runs, and his purpose is not to raise a crop or run machinery or to mine or otherwise apply it to a useful purpose, he has no valid right to such excess by the mere fact of a diffusion of waste water upon the grounds, even

though they be susceptible of cultivation. The intention of the claimant is, therefore, the most important factor in determining the validity of an appropriation. When that is ascertained, limitation of the quantity of water necessary to effectuate his intent can be applied according to the acts of diligence and needs of the appropriator.

Power vs. Switzer, 21 Mont. 530-531.

One of the rules in the system of the law of water rights is that no one man can, by prior appropriation, obtain exclusive control of an entire system unless his appropriation is made for some beneficial purpose presently existing or contemplated. He is restricted in the amount that he can appropriate and the quantity needed for such beneficial purposes. The court then quotes its language in the Power-Switzer case, *supra*, as to the intention of the claimant.

Toohey vs. Campbell, 24 Mont. 17.

These cases, in the particular referred to, are approvingly considered in the case of

Miles vs. Butte Electric Co., 32 Mont. 67.

See also

Am. & Eng. Ency. of Law, 2nd Ed., Vol. 18,  
p. 498;

Combs vs. Agricultural Ditch Co., 17 Colo.  
146, 31 Am. St. Rep. 275.

We have referred to these cases because the evidence on this point is uncontradicted. The canal was taken out for the purpose of mining some

ground on the Missouri river, the water to be used for that purpose in the spring, and in the fall, before and after the irrigation season commenced and ended. The mining operations were only carried on for one season, and, therefore, the only use to which the water was applied, so far as this record discloses, was the irrigation of a garden patch belonging to McFarlane in 1885. When the ditch was constructed by appellants, they were justified in assuming, in the light of the intention for which the appropriation was made, that outside of the use for the irrigation of the McFarlane patch, they would be entitled to its use. At this time no change in the use had taken place. It was long after this when, through some kind of a re-organization, this abandoned canal was taken up, and as if by the touch of the magician's wand, became water producing.

Another proposition which seems to be axiomatic, is that the prior appropriator cannot increase his demands so as to deprive a subsequent appropriator of his rights acquired before such increased demands and use.

Becker vs. Marble Creek Irrigation Co., 49

Pac. 892;

Hague vs. Nephi Irrigation Co., 52 Pac. 765;

Ramelli vs. Irish, 31 Pac. 41;

Hargreave vs. Cook, 108 Cal. 80;

Strickler vs. City of Colo. Springs, 25 Am.

St. Rep. 248;

Last Chance Mng. Co. vs. Bunker Hill Mng.

Co., 49 Fed. 433.

The law is likewise too well settled to need cita-

tion of authorities, that the use cannot be enlarged to the detriment of a junior appropriator.

Power vs. Switzer, *supra*;

Union Mng. Co. vs. Dangberg, 81 Fed. 73.

We have, in the light of these plain, well-settled propositions of law, a record disclosing a case where in the seventies a ditch was constructed to carry on mining on the Missouri River, and on account of inability to handle the gold, because of its fineness, the project was abandoned, the intention being, when the appropriation was made, that the water would be used in such a manner as not to interfere with its use for irrigation purposes, and so that no interference would occur that the water would be used only in the spring and in the fall. That after being used in this way for one year, there was no further application of the water for any beneficial purpose except to irrigate a garden patch belonging to McFarlane, and to irrigate a small tract of land belonging to Ross. That these were the conditions existing at the time appellants constructed their ditch, and for many years afterwards. These being the facts so clearly established, as we contend, as to become almost conceded facts, the giving of the right embodied in this finding is practically to set at naught elementary rules governing the appropriation of water, and in legal effect to confiscate the property of appellants.

## DEVELOPED WATER.

The right is given of 160 inches on account of developed water. Willow Swamp canal covers a large territory, and, to borrow from the language of the learned gentleman representing the respondents, it has existed "from time immemorial, when the memory of man does not run to the contrary."

This swamp is practically the source of rights antedating the construction of the canal, amounting to 300 inches of water. It was not a stagnant body of water, but had an outlet and furnished to that outlet a constant supply of water. In 1895-6, when respondents resurrected the canal, they deepened and widened the cut going through it, and removed some obstructions, the growth of years, and this is the basis of the developed water claimed. Mr. Macomber made measurements in 1895 of the water flowing from the swamp and found that there were 324 inches, and again made a measurment in 1896, some little time after the cut was made, and at this time he measured 513 inches. He says that the output of this swamp would be materially affected by rains, and that he could not tell whether the difference was due to work done or was due to rains. The testimony of Mr. Ross is to the effect that a cut was run through this swamp in '79 or '80, and in his judgment the output was doubled, but Mr. Ross' testimony is rather indefinite and from its perusal very little satisfaction can be obtained. This is due, not to any purpose to mislead, but rather be-

cause of age and infirmity. The only other evidence on this point is the testimony of Massa, who says that the water of the swamp was increased by about one-half on account of the work done. There is evidence to the contrary that the work done did not increase the output at all.

We appreciate that if the evidence is conflicting, this court will not interfere, as least not unless the evidence preponderates against the finding.

Our contention is that there is no evidence worthy of serious consideration to warrant the finding in favor of developed water. The court will take judicial notice of the fact, we presume, that in a swamp as large as this is, the removal of obstructions in a cut where water is impounded, will for a time occasion an increased overflow, but this not developed water.

In this case, it seems to us that to sustain this claim there should be some evidence that this increased outflow continued for a sufficient length of time to warrant the conclusion that it had the element of permanency to it.

This question of developed water was under consideration by this court in the case of

Beaverhead Canal Co. vs. Dillon Co., et al.,  
34 Mont. 140,

and the doctrine there announced seems to be as follows:

If by one's exertions, the available supply of water in a stream is increased, he has a right to appropri-



ate and use it to the extent of the increase. This rule does not apply to the mere removal of obstructions or hastening the flow so that the actual amount of water which passes along the stream is not increased, but only to cases in which a supply of water is added to the stream which would otherwise not have flowed there.

But in this case, we submit that under the pleadings there was no authority for a finding in favor of developed water. A party is bound to recover, if at all, upon the causes of action alleged, and not upon some separate and distinct cause of action which may be disclosed by the evidence.

Boothe vs. Farmer's Nat'l Bank, 83 Pac. 785.

And a finding of fact outside the issues made by the pleadings is a mere nullity and will not sustain the judgment.

Boothe case, *supra*;  
Male vs. Shaut, 69 Pac. 137;  
Gamache vs. South School Dist., 65 Pac. 301;  
Ency. Pl. & Pr. Vol. 8, p. 944;  
Harris vs. Lloyd, 11 Mont. 390.

The pleadings in a case must evolve an issue of law or fact before a judgment can be rendered, and a judgment rendered without such issue is void.

Black on Judgments, Sec. 184;  
Ency. Pl. & Pr., Vol. 11, p. 864.

We submit that on the record presented the finding as made should be set aside and that upon consideration of the evidence the respondents should

not be given a right antedating appellants' of to exceed twenty-five inches, and it should be adjudged that no right was initiated on account of the development of water.

Respectfully submitted,

C. B. NOLAN,  
Counsel for Appellants.





IN THE  
**Supreme Court**  
OF THE  
STATE OF MONTANA

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JOSEPH E. SMITH and THE RIVERSIDE  
LAND AND LIVESTOCK COMPANY,

Plaintiffs and Respondents,

vs.

A. T. DUFF, et al.,

Defendants and Respondents,

JAMES KITTO and DAVID F. WILLIAMS,

Defendants and Appellants.

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BRIEF OF APPELLANTS KITTO AND  
WILLIAMS.

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I.

STATEMENT OF CASE.

This is an appeal by James Kitto and David F. Williams and presents for consideration a question of law and a question of fact.

The question of law involves the refusal of the court to make a finding as to whether or not the appellants acquired title to the awarded water by adverse user, and the question of fact involves the

consideration of the evidence as to whether or not a finding to this effect, as to the quantity of water given them by the decree should not be made by this court.

While on the evidence complaint might justifiably be made that the quantity awarded to the appellant David F. Williams should be in excess of the amount decreed, the evidence as to the capacity of the ditch taking the water to his land is conflicting, and while we contend that the preponderance of the evidence would authorize a quantity in excess of that given, we do not feel disposed to raise that question.

The action is what is known as a water right suit. Williams in his cross-complaint alleged:

"That he, in his own right, and aside from any rights in and to the waters of said Creek accruing to him in his representative capacity as joint executor of the estate of David T. Williams deceased, and as heir-at-law of said estate as hereinafter set forth, is now the owner, and at all the times hereinafter mentioned through his grantors and predecessors in interest was the owner, in possession and entitled to the possession of the following described premises, situate in Broadwater County, Montana, and particularly described as follows, to-wit: Section 10, Lots 1 and 2, S.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$ , and the S. E.  $\frac{1}{4}$  of section 4, township 4 north, range 1 east, containing in all about one thousand acres.

"That for mining and agricultural purposes the grantors and predecessors of defendant in and to the water rights herein asserted, constructed ditches tapping the main channel of Crow Creek about two miles above the point of bifurcation above referred to, and appropriated through the ditches thus constructed

about twenty-eight hundred inches of the waters of Crow Creek.

"That the ditches thus referred to were constructed at the times and conveyed the quantities of water herein set forth.

"Ditch number 1, known as the Rader ditch was constructed on May 15th, 1866, and diverted one hundred inches of water.

"Ditch number 2 was constructed July 16th, 1867, and diverted six hundred inches of water.

"Ditch number 3 was constructed August 23rd, 1867, and diverted eight hundred inches of water.

"Ditch number 4 was constructed September 5th, 1867, and diverted two hundred inches of water.

"Ditch number 5 was constructed October 7th, 1867, and diverted one thousand inches of water.

"That these ditches so constructed had a separate and independent existence, and the water so diverted to the extent of the quantity named was used for mining purposes upon the placer ground contiguous to the channel of Crow Creek.

"This defendant further avers that when said water was appropriated it was the intention of the appropriators to use said water for agricultural purposes and for the irrigation of land and in the execution of that intention to permanently deprive Crow Creek of the quantity of water named and in the furtherance of that purpose after subjecting the water to mining uses and before the same returned to the channel of Crow Creek about twelve hundred inches of said water was taken to and upon the premises of defendant heretofore described for the irrigation of them and said quantity has been used upon said premises continuously ever since.

"That of the remaining quantity of water so diverted the same was allowed to return to the South Fork of Crow Creek after being used for mining purposes as aforesaid and became subject to appropriation and use by

others than the defendant and his predecessors in interest.

"This defendant further avers that ever since the date of the appropriation of said waters, he and his grantors and predecessors in interest have had the continuous, exclusive, uninterrupted, peaceable, notorious and adverse enjoyment and possession of twelve hundred inches of the waters of Crow Creek so appropriated, diverted and used on said premises as aforesaid as against the plaintiffs and his co-defendants and all others, with the knowledge of all and under a claim of right."

Transcript, pages 60-62.

✓ Kitto in his cross-complaint alleged:

"That he is now the owner in the possession of and entitled to the possession of the S. E.  $\frac{1}{4}$  of section 2, township 4 north, range 1 east, Broadwater County, Montana, and through his grantors and predecessors in interest has been such owner and so in the possession of said tract of land continuously ever since the 15th day of May, 1866.

"That for mining and agricultural purposes the grantors and predecessors in interest of defendant on or about the 15th day of May, 1866, constructed a ditch and diverted about 200 inches of the waters of Crow Creek through the ditch so constructed and after the use of said quantity of water for mining purposes one hundred inches thereof were taken to and upon the said premises above described and said quantity has been used upon said premises ever since for the proper irrigation of them.

"This defendant further avers that ever since the date of the appropriation of said waters, he and his grantors and predecessors in interest have had the continuous, exclusive, uninterrupted, peaceable, notorious and adverse enjoyment and possession of one hundred inches of the waters of Crow Creek so appropriated, diverted and used on said premises as aforesaid as against the plaintiffs and his



co-defendants and all others, with the knowledge of all and under a claim of right."

Transcript, pages 68-69.

✓ To dispense with the necessity of filing replies and corss-complaints a stipulation was entered into as follows:

"It is also further agreed that all of the affirmative allegations of answers filed are deemed denied by all the parties without filing pleadings so denying the same; the full meaning of the pleadings shall be deemed controverted by all parties without the necessity of replies or whatever pleading an answer to an answer would be."

Transcript, page 233.

✓ The case was tried to the court without a jury.

Transcript, page 231.

✓ Findings as to the rights in question were made as follows:

#### XXXVIII.

"That the defendant James Kitto by and through his predecessors in interest, on the 1st day of May, 1881, by means of a ditch known as the original Quinn ditch diverted and appropriated one hundred and fifty (150) inches of the waters of Crow Creek and conveyed same to and upon the land now owned by him.

#### XXXIX.

"That the defendant David F. Williams, by and through his grantors and predecessors in interest, on the 1st day of May, 1884, by means of a ditch known as the Dave Williams ditch, diverted and appropriated five hundred (500) inches of the waters of Crow Creek and conveyed same to and upon the lands now owned by him."

Transcript, page 205,

and by decree this quantity of water was given.

Transcript, page 221.

✓ Upon the submission of the evidence it was agreed as follows:

“Thereupon it was agreed that briefs and findings should be submitted by the respective parties, and also orally in court each of said parties submitted what its claims were as to the water rights to be awarded under the evidence and pursuant to the agreement had, the defendants Williams and Kitto made request for findings to the effect that the said Dave Williams should be awarded by the decree, and that findings so declaring should be made by the court, 600 inches of the waters of Crow Creek, and that his right to the same rested on adverse user and prescription and the said Kitto should be awarded by the decree, and that findings should be made so declaring, 150 inches of the waters of Crow Creek, and that his right to same rested on adverse user and prescription, and a request was made by the said Williams and the said Kitto that findings should be made by the court, as to the quantities to which they were respectively entitled, and that they acquired the right to same by adverse user and prescription.”

Transcript, pages 445-446.

✓ Tentative findings were made by the court.

Transcript, page 446.

✓ And again a request for findings as to the rights in question was submitted, and especially that findings should be made as to whether or not title to the water by adverse user had not been acquired. There was a refusal to make a finding on the issue of adverse user, and this is the legal question which is presented for consideration on this appeal.

Transcript, page 449.

A notice of intention to move for a new trial was served and filed,

Transcript, page 227,  
and overruled.

Transcript, page 460.

And from this order overruling the motion for a new trial, and from the judgment and decree, this appeal is taken.

Transcript, page 461.

## II.

### ERRORS OF LAW.

1. The court erred in not making the finding as to whether or not David F. Williams acquired title to the water decreed to him by adverse user.

2. The court in not making a finding as to whether or not James Kitto acquired title to the water decreed him by adverse user.

3. The court erred in not basing the Williams and Kitto rights on adverse user.

4. The court erred in finding that David F. Williams' right rested upon an appropriation fixed as of the first of May, 1884, rather than upon adverse user.

5. The court erred in finding that the Kitto right rested upon an appropriation fixed as of the first day of May, 1884, rather than upon adverse user.

6. The court erred in not finding that the Williams and Kitto rights rested upon adverse user rather upon the dates of appropriation as fixed.

## III.

## ARGUMENT.

## FAILURE TO MAKE FINDING ON ADVERSE USER.

The question as to whether or not Kitto and Williams had acquired title by adverse user to the water claimed by them was an issue of fact by the pleadings and under the proof, and the court should have made a finding thereon.

In the case of

Estill vs. Irvine, 10 Mont. 512,

the court said:

“It appears from one bill of exceptions that ‘at the trial of said cause, after the same had been argued by counsel, and before the same was submitted to the court for its decision, the said plaintiffs, among other things submitted to the court to find on as facts, asked the court to find definitely the amount of water that plaintiffs were entitled to and owned, and drew up a finding, and presented the same to the court, to find on as to the same, and which requests were as follows: That plaintiffs own, and have ever since prior to the year 1879 owned, the waters of said Tin-Cup Joe Creek, to the extent and amount of ——— inches, measured under a six-inch pressure, and in the manner provided in the laws of Montana for the measurement of water; and that the court failed to find on said question as to the definite amount of water owned by plaintiffs.’

“It is evident that this was one of the material issues in the case, and we are unable to find a legal reason for its omission by the court. The rights of the parties demanded that this matter should be passed upon so that the litigation growing out of the controversy might be finally determined. \* \* \* It is maintained by the respondent that this issue

is immaterial, inasmuch as the court has found that the appellants have enjoyed without interruption their right to the water in controversy. We concede that the Supreme Court of California has often asserted the rule that a judgment will not be reversed through the failure to find upon certain issues which would not require a different judgment. (Johnson v. Perry, 53 Cal. 351; Robarts v. Haley, 65 Cal. 397; People v. Center, 66 Cal. 551; Malone v. County of Del Norte, 77 Cal. 217.) These decisions have been made under a Code of Civil Procedure which does not embody many provisions relating to findings of facts which are enforced in this State. In North v. Peters, 138 U. S. 271, Mr. Justice Lamar in the opinion said: 'In the case of Dole v. Burleigh, 1 Dak. 227, on which counsel for appellant mainly relies, the trial court omitted to find upon a material issue presented by the pleadings, but it made no additional findings. The court laid down and applied the long established principle, nowhere controverted, that the findings of fact by a court, like a special verdict, must decide every point in issue, and that the omission to find any material fact in issue is an error which invalidates the judgment.' "

The case of

Quinlan vs. Calvert, 31 Mont. 115,

is likewise directly in point.

The failure to make findings on material issues is reversible error.

Christy vs. Spring Valley W. W. 84 Cal. 541;  
 McTarnahan vs. Pike, 91 Cal. 540;  
 Ball vs. Kehl, 95 Cal. 606;  
 Duane vs. Neumann, 2 Pac. 274;  
 Hawes vs. Green, 3 Pac. 496;  
 Ross vs. Evans, 4 Pac. 443;  
 Casey vs. Jordan, 9 Pac. 99;  
 Conklin vs. Stone, 6 Pac. 378;

Everett vs. Jones, 91 Pac. 360;  
Leviston vs. Ryan, 75 Cal. 293;  
Later vs. Haywood, 93 Pac. 374.

It was the duty of the court to supply omissions in the findings when its attention was called to such omissions.

Luse vs. I. T. R. Co., 6 Or. 124;  
Simmons vs. Richardson, 5 Hun. 177;  
Logan vs. Hale, 42 Cal. 646;  
Ogburn vs. Connor, 46 Cal. 353;  
Hayes vs. Wetherbee, 60 Cal. 399;  
Mitchell vs. Jensen, (Utah) 81 Pac. 165.

Where evidence is introduced on a material issue, the court should make the finding thereon, and until such finding is made judgment may not be properly rendered.

Dieterle vs. Bekin, 77 Pac. 664, 143 Cal. 683.

#### ADVERSE USER.

The evidence uncontradictedly shows that in 1867 three mining ditches were constructed to take water to placer mining ground, which was extensively worked at the time named. These ditches were known as the Rader ditch, the Quinn and Howe ditch, and the Peyton ditch. They tapped Crow Creek at a point above where water was diverted by the other ditches. Priority as to time of appropriation was claimed for these ditches, except as to two water rights, known as the McKay right and the Hossfeld right, which were agricultural rights. These latter rights had precedence

over the three mining rights, and their precedence was recognized by the owners of the mining rights. The water appropriated through the mining ditches was taken to mining ground near Radersburg, and after being used for mining purposes it found its way back to the channel of Crow Creek, or to a branch thereof, and was used for agricultural purposes below the point where it returned to the creek. The three ditches in question carried a quantity of water far in excess of the amounts awarded to Williams and Kitto, so that it would serve no useful purpose to discuss the evidence as to the carrying capacity of the ditches, for the lowest estimate would place the amount largely in excess of 650 inches. The evidence likewise uncontradictedly shows that during each year during the low water season, all of the water flowing in the channel of the creek was diverted through these ditches, except the quantity necessary to supply the McKay and Hossfeld rights, and so as to minimize loss through seepage in the case of the Hossfeld right, the water supplying that right was furnished from the mining ditches after it had been diverted.

It is needless to refer to any particular testimony in this record to establish the foregoing facts. There is no conflict in the testimony as to the matters above set forth.

In 1880 the ownership of the three ditches was in Mr. Quinn, and all of the water of the creek,

during the low stage, was taken through those ditches, and taken from Crow Creek at a point above the heads of the other ditches through which rights are claimed. The water after being used for mining purposes was dumped into a gulch known as Keating gulch, and, as already stated, returned to Crow Creek, or to the branch thereof known as Muddy Creek. In 1879 or 1880 Mr. Quinn made a filing on a homestead, now the Kitto place, and for the purpose of getting water on it, in 1880 or 1881, the time is not material, he constructed a ditch from Keating gulch to the homestead and placed in Keating gulch a dam, which interrupted this water after being used for mining purposes, and through this ditch took this mining water to his place for the irrigation of the 160 acre tract covered by his homestead.

In 1881 or 1882 Mr. Quinn made a filing on Section 10 as a desert entry, containing 640 acres, and soon thereafter additional land was secured or used by him. In 1883 or 1884 another dam was constructed by him in Keating Gulch, which intercepted all of the waters carried through the mining ditches, and at this time a large ditch was constructed to take water from Keating gulch to his additional landed possessions. There is some conflict in the testimony as to the carrying capacity of this ditch, but as to the other facts they stand as conceded facts under the proof.

After 1884, during the low stage of the water



each and every year all of the water flowing in the channel of Crow Creek was diverted through the mining ditches, except water sufficient to supply the McKay right and the Hossfeld right, and after being used for mining purposes was dumped into Keating gulch, was there intercepted by the dam, and was taken to the premises of Quinn. The Jubilee Placer Mining Company was Quinn's successor, and the same disposition was made of the water. In truth it may be said, on this record there is no serious controversy upon this point, as seemingly upon the trial the efforts of the opposition were concentrated on reducing as much as possible the size and capacity of the ditches taking the water from Keating gulch.

The facts herein set forth are established by the testimony of J. C. Stewart, (Tr. p. 245), James Wood, (Tr. p. 269), Chase Worden, (Tr. p. 284), Henry Raymond (Tr. p. 299), Henry Pickell (Tr. p. 301), Frederick Temple (Tr. p. 304), A. T. Duff (Tr. p. 322), James Williams (Tr. p. 330), Henry Nicholson (Tr. p. 346), Julius Hargrove (Tr. p. 358), and David Williams (Tr. p. 370.)

Soon after the second ditch leading from Keating gulch to the Quinn premises had been constructed, those who theretofore had been taking water from Muddy Creek sought to enjoin Quinn from taking the water, but Quinn succeeded in this litigation, after which he was relieved from further molestation or interference. We have then by this record,

as we claim, the fact established without contradiction that after 1884, during the low stage of water, each and every year, all of the water taken from the channel of Crow Creek, before the heads of any of the ditches of the other litigants were reached, and after being used for mining purposes taken to the premises of Williams and Kitto, and there used for agricultural purposes. The rights of others were in no manner recognized except the two rights referred to, and this was the situation down to the time when the case was tried.

An inspection of the evidence will show that these facts were not disputed by the opposition. Indeed, as already stated, the principal aim and purpose was to reduce the appropriation to as low a quantity as possible, yet with the evidence in this shape a claim of title by adverse user was ignored, and a right was given by appropriation as of the dates when the ditches were constructed from Keating gulch to the Quinn premises. We respectfully submit that these rights should take precedence of all others except the McKay and Hossfeld rights.

The evidence shows that during all of this period, from 1884 on, there was need at all seasons of the year for the water to the extent of the amounts awarded by the decree, and especially during the low water season when all water flowing in the channel of the creek was diverted by the mining ditches in question.

We submit that if ever a case of adverse user of water was established in a court of justice, this is one, and that title by prescription to the water awarded is clearly made out.

Quinn and those who immediately succeeded him undoubtedly, yet erroneously, entertained the idea that the appropriation of water for mining purposes in 1867 gave them an absolute right to the water, not only for mining purposes, but for agricultural purposes, even though from 1867 down to 1881 and 1884 the water, after being used for mining purposes, was permitted to return to the channel of the creek. They believed that when the water was taken from Keating gulch in 1881 and 1884 they had the right to take it as against those who made appropriation subsequent to 1867. They acted upon that belief and in the action that was tried to dispute their right to do this they were successful. Their use of the water, under the circumstances, for over twenty years in this way, clearly gave them the right to it by prescription.

"The acts by which it is sought to establish the prescriptive right must be such as to operate as an invasion of the right of the person against whom the prescriptive right is asserted and will give a cause of action in his favor."

Long on Irrigation, 90;  
Chessman vs. Hale, 31 Mont. 577.

There can be no doubt, under the evidence, that the respondents and their predecessors in interest

could have maintained an action against appellants' predecessors for depriving them of water subsequent to 1881 and 1884, down to the time when their right to it for agricultural purposes ripened into a title by prescription.

Title by prescription is clearly made out. The California statute is five years. It was applied in a late case.

Hubbs vs. Pioneer Water Co., 83 Pac. 253.

The essential facts and the ruling are thus expressed in the syllabus:

"Where for nine years an appropriator of water continuously diverted a certain amount of water, which deprived an appropriator lower on the stream of the full quantity appropriated by him and the ditch of the former was maintained continuously and uninterruptedly under a claim of right, and during that time the diversion was not disturbed by the lower appropriator, the upper appropriator acquired a prescriptive title to the use of such amount of water."

From the body of the opinion we make this quotation:

"Necessarily the use of this water has been adverse to the right asserted by plaintiff and its predecessors, and actionable at all times when such use deprived them of the full quantity by them appropriated, and this, according to the findings, has happened every year between August and November, when defendant was diverting 25 feet per second through the Pioneer ditch, and no water flowed to the point of plaintiff's diversion. The authorities which support this view are numerous and uniform. We cite the follow-

ing: *Coonrad v. Hill*, 79 Cal. 587, 21 Pac. 1099; *Smith v. Hawkins*, 110 Cal. 122, 42 Pac. 453; *Gallaher v. Montecito, V. W. Co.*, 101 Cal. 242, 35 Pac. 770; *Spargur v. Heard*, 90 Cal. 222; 27 Pac. 198; *Heilbron v. Last Chance Co.*, 75 Cal. 117, 17 Pac. 65; *Alhambra Co. v. Richardson*, 72 Cal. 598, 14 Pac. 379."

Another late case from the same court is particularly applicable because there, as here, the upper appropriator took *all* the water of the stream. The syllabus says:

"2. Where the upper riparian owner has lawfully used all the water of a stream during certain seasons of each year for more than five years, he cannot be restrained from continuing such use."

The language of the opinion on the point is as follows:

"The evidence shows that during the irrigation seasons or periods the defendant had been accustomed to take and use *all* the water flowing down to his reservoir in the stream, and that he had been doing this for a period of upwards of five years. Of course, he is entitled to continue this use."

*Gutierrez et al. vs. Wege*, 79 Pac. 449-451.

This court, in

*Talbott vs. Butte City Water Co.*, 29 Mont. 17-27,

quoted the following expression from the Supreme Court of California:

"When there is sufficient water in the river to supply *all* parties, there can be no such thing as adverse use of the water to start the statute of limitation running. Each is entitled to the use of the water, and it is only

*when the water becomes so scarce that all of the parties cannot be supplied, that there is an adverse use.' "*

See likewise

Norman vs. Corbly, 32 Mont. 195.

In view of the undisputed testimony that appellants' predecessors took *all* the water in the stream during its low state, and at a time when the water was needed by respondents, there is no element of adverse user that is not met by the proof.

As it is found, in accordance with the proofs, that the land requires irrigation in order to grow crops and it is not open to dispute that appellants' predecessors took all the water in the stream, claiming the right to do so, whenever there was in it more than enough to fill the mining ditches, a condition existing each year after July 15th, it necessarily follows that the respondents were deprived of the use of the water when they needed it.

It appears, accordingly, that there must have been a substantial interference with their rights. But in view of the testimony of the taking of the waters by appellants and their predecessors the burden is on the respondents to show, if they so claim, that notwithstanding the taking, there was still sufficient for their use. It was so held in a recent case by the Supreme Court of Oregon in

Gardner vs. Wright, 91 Pac. 286.

Touching this point the court said:

"The adverse possession urged and established as a defense may be defeated by showing

that such use was interrupted within the statutory period, or, in other words, that the use during the irrigation seasons for the statutory time, under the conditions named, was not continuous, *or by proof that such use did not substantially interfere with plaintiffs' rights.* Britt v. Reed, 42 Or. 76, 70 Pac. 1029. While an adverse right cannot grow out of mere permissive enjoyment, the burden of proving possession thus claimed to have been held by such permission or subserviency is cast upon the party attempting to defeat such claim. *Coventon v. Seufert*, 23 Or. 548, 32 Pac. 508; *Rowland v. Williams*, 23 Or. 515, 32 Pac. 402; *Bauers v. Bull*, 46 Or. 60, 78 Pac. 757; *Horbach v. Boyd*, 64 Neb. 129, 89 N. W. 644. The same rule would necessarily apply to any other assertion made for the purpose of defeating the running of the statute, and it accordingly follows, after the showing made by defendant, that, in order to defeat his claim of adverse possession, the onus was upon plaintiffs to establish that the use by Estes was not continuous for the statutory period, as well as to establish, if reliance is had thereon, *that the use by defendant and his grantor was not such as to constitute a substantial interference with their rights.* So far as appears in the record, the plaintiffs and their predecessors in interest at all times, since the open manifestation by Estes of his claim in 1872 to the waters of Washington creek, actually needed *all* the water of this stream for domestic and irrigation purposes. Its use, therefore, by defendant and his grantor under such conditions constituted an invasion of the rights claimed by plaintiffs and their predecessors. *It being incumbent upon the plaintiffs to show that the use of the water on the Estes farm did not substantially interfere with their rights, and there being no evidence in the record to that effect, but, on the contrary, it appearing that the use of the water was necessary and that they were deprived of its benefit by the Estes place for more than the 10-year period, the claim of adverse possession is clearly established."*

The principal of this decision was also declared by the Supreme Court of California in a recent case, **Guernsey vs. Antelope Creek Co.**, 92 Pac. 326.

We respectfully submit that a finding should be made that the rights in question have been acquired by adverse user, and in point of time should antedate the other rights mentioned in the decree, except the McKay right and the Hossfeld right.

Respectfully submitted,

C. B. NOLAN,  
Counsel for Appellants.



# In the Supreme Court

OF THE

## STATE OF MONTANA.

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JOSEPH E. SMITH and  
THE RIVERSIDE LAND AND LIVE-  
STOCK COMPANY,

Plaintiffs and Respondents,

*vs.*

A. T. DUFF ET AL.,  
Defendants and Respondents,  
JAMES KITTO and DAVID F. WILLIAMS,  
Defendants and Appellants.

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### BRIEF OF RESPONDENTS.

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Motions to dismiss have heretofore been made, the consideration of which has been by the court postponed until the final submission of the cause.

As the propositions advanced are canvassed in briefs filed with the motions, discussion of that subject is in this brief dispensed with.

The court is respectfully referred to the

presentation of the views of the respondents in the brief submitted with the motions for what they have to advance as to that feature of the case.

The determination of the question as to whether the appellants should have any such relief as they claim to be entitled to, necessitates an examination, should the court find that the case is reviewable at all, of (1) the pleadings, and (2) the evidence touching adverse user.

## I.—THE PLEADINGS

The pleadings do not assert the *adverse user* by the appellants of the waters of Crow Creek, but declare that they respectively have had the adverse “possession and enjoyment” of them.

A declaration that one has had the adverse *possession* and enjoyment of the waters of a stream affords no basis for a claim of prescriptive right. It is adverse *use* alone that confers it.

The use of the word “possession” in connection with the water of a stream is wholly inappropriate to convey any such idea as that upon which rests a *water right*.

The word “possession” clearly expresses the condition which gives rise to a prescriptive right to things corporeal. One acquires title to a horse by having it in his (adverse) *possession*

for the period prescribed by the statute. So he acquires title to lands by having the possession of the same. Indeed, if a controversy arose over the ownership of any specific water,—a quantity of Poland water, apollinaris or any water in bottles, casks or other receptacles—adverse *possession* of the same could be asserted as a basis of a claim of right by prescription.

When one says he has had the adverse *possession* of 100 inches of the waters of a stream, the language he uses conveys the same idea, except for the indefiniteness as to quantity and difference in quantity, as would be conveyed if he had said that he had the adverse *possession* of ten barrels of the water of the stream.

No adverse possession of any quantity of the water of a stream gives one the right continuously to divert the water of the stream to any extent,—much less can any priority of right of diversion be gained by reason of such *possession*.

“Inasmuch as there can be no ownership of the corpus of the water of a running stream, it is not, and cannot be made, the subject of private ownership.”

Long on Irrigation, 72.

No one can have “possession” of the waters of such a stream. He may have the right to

take water from the flowing stream, but he cannot "possess" the water of it.

The language of the pleading, accordingly, that the appellants have had the "possession" of 100 or 600 inches of the waters of Crow Creek is meaningless.

But if it could be conceived that they had the possession of such in any sense, still no right to divert would be acquired unless the water had been put to some beneficial use.

If one can have the possession of water flowing in a ditch—and it is denied that one can be said to own such water—

Bear Lake Irr. Co., vs. Ogden, 33 Pac.  
135,

it can scarcely be claimed that the mere possession of it in such manner will give any right, however long continued.

If one, from caprice or to gratify his esthetic tastes, diverts the water of a stream and carries it through a ditch, by or through his premises and elsewhere, but makes no use of it, allowing it to fall back into the stream below or into another water course, he would have the "possession" of the water to as full an extent and in as complete a degree as would he who had used it for irrigation or other beneficial purpose. But however long he had persisted in such

course, it is apprehended he could claim no right to continue the diversion.

Lavery vs. Arnold, 57 Pac. 906.

In other words, adverse *possession* gives no right to the waters of a stream, but only adverse *user*.

The word "possession" is indeed sometimes used in connection with the acquisition of a water right by prescription, by courts and text-writers, but it is meaningless when used separate and apart from "user" and scarcely less so when used in conjunction with it.

The works on irrigation treat of the adverse *user* of water as giving a right by prescription, not the adverse *possession* of the water.

Long on Irrigation, Chap. VIII., Id. Sec.  
88.

The language of the author in the section last cited is that "The right to the use of water for irrigation may be acquired not only by original appropriation or by grant, but also, as against individuals in whom the right is vested by adverse possession and use." Whatever significance may be attached to the use of the word "possession" in this expression, the adverse *use* is an essential requirement as a basis for the right.

So in

Cox vs. Clough, 11 Pac. 732,

the expression is used:

“An adverse possession and *user* of water for five years continuously and uninterruptedly, with the knowledge and *to the injury* of the true owner will bar his right thereto.”

The right to take water from a stream is an easement,

Section 1250, Civil Code,

Smith vs. Denniff, 24 Mont. 20,

and a prescriptive right to an easement is acquired by adverse *user* of the thing, not by adverse *possession* of it.

Roe vs. Howard Co., 166 N. W. 587;

Ballard vs. Demmon, 31 N. E. 635.

Now, there is no averment in this pleading that the appellants or either of them *used* the waters claimed by them continuously, exclusively, uninterruptedly, peaceably, notoriously and adversely, for any period, but simply that they so had the “enjoyment and possession” of waters which were referred to in preceding paragraphs, as having been diverted and used.

The pleading is not bettered by saying that the appellants have had the “enjoyment” of the

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waters. They might have had that in abundance if the waters never left the natural bed of the stream. Few people who have lived with-in sight of a natural stream of running water have not enjoyed it.

Youths enjoy exuberantly the waters of many streams for bathing, and even gray haired men accustomed to lave in the baths provided by nature would find it a deprivation if some prosaic utilitarian should divert the water of a stream and destroy "the old swimming hole."

The "enjoyment" of the waters of a stream affords no ground for denying to one the right to divert for a useful purpose.

But if a prescriptive right to the use of water can be founded on an averment of adverse "possession" of the waters of the stream in question, the pleadings under consideration are bad for want of an averment that such possession was either "actual" or "open."

Constructive possession will not justify a claim of prescriptive right to those things which can be possessed. It must be actual. And a plea of prescription must aver that possession was "actual."

13 Ency. of Pl. & Pr. 286;

Omaha vs. Parker, 51 N. W. 139;

1 Ency. of A. & E. Law, 822.

Doubtless if one can have the possession of the waters of a stream, he would acquire a constructive possession by appropriation under the acknowledged rule that the possession follows the legal title. So that the appropriator would be deemed to be in possession whether he was actually diverting and using the water or not. But such possession would never ripen into a prescriptive right.

Practically all the writers, as well as all the cases, assert that either possession or user must be "open" as well as "notorious."

13 Ency. of Pl. & Pr. 290-291,

This court said in

Bullerick vs. Hermsmeyer, 32 Mont.  
541-554:

"We understand the rule to be that, in order to acquire a right by prescription against the owner of real estate, the holding must be *open*, notorious, exclusive and adverse under a claim of right during the full statutory period."

The deeds and lives of many men become notorious, though they are not open, and though the greatest secrecy may be exercised concerning them. And so one might furtively, in the night time, take water from a stream or ditch and his custom to do so become quite notorious, and yet



a prescriptive right would not be initiated because the taking was not "open."

"The possession must not only be actual, but also visible, continuous, notorious, distinct, and hostile, and of such a character as to indicate unmistakably an assertion of a claim of exclusive ownership in the occupant; *Satterwhite v. Rosser*, 67 Tex. 166, and cases cited."

*Evans vs. Templeton*, 5 Am. St. Rep. 71-73;

*Faull vs. Cooks*, 20 Am. St. Rep. 836-841.

"Adverse possession to ripen into a prescriptive title must be *actual, open*, notorious, exclusive and continuous for the statutory period."

*Wilson vs. Braden*, 49 S. E. 409.

But whatever view may be taken of the sufficiency of the pleas of prescription in their general aspects, it is indisputable that they do not permit an investigation of the questions which appellants seek to present to this court.

The specifications of error, designated Errors of Law, present as Specifications 1 and 2 that the court erred in not making finding on adverse *user* by the appellants. There was, as shown, no pleading upon which to make a finding of adverse *user*. This contention is not

open to review for reasons hereafter canvassed. In addition to what is there said, it may be suggested, in passing, that if the objection should be well founded, the proper order would be that the case be remanded with directions to the lower court to make findings on that particular issue; not to direct what finding to make, but to make *some* finding. But that procedure is at war with the spirit of section 6253 of the Revised Codes of Montana, 1907, which clearly contemplates a final disposition of the cause in this court. Since the passage of the act now embodied in that section, error can not be assigned on the failure of the court below to make findings, since this court is required to hear the case practically *de novo*. . .

Specification 3 says: "The court erred in not basing the Williams and Kitto rights on adverse user."

If this is anything more than a repetition of Specifications 1 and 2, a complaint that no finding of adverse user was made,—and may be considered as directed at the decree, it is certainly most indefinite in pointing out error in it.

Specifications 4 and 5 say that the court erred in finding that appellants' rights rested upon an appropriation of May 1, 1884, instead of upon adverse user.

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It seems no complaint is made about the finding that such appropriation was made, but the complaint is of a finding in the case of each appellant that the right *rested* upon appropriation. There is no such finding other than the finding that the appropriation was made.

Specification 6 complains that the court erred "in not finding that the Williams and Kitto rights rested upon adverse user rather than upon the dates of appropriation as fixed."

Even if complaint could be heard that the court did not make a finding, there was no averment in the pleading that the rights *rested* on adverse user, except so far as that conclusion might follow from the attempted plea of prescription.

What the appellants really complain about, if we are to gather it from the argument of the brief rather than from the specifications, is that the court erroneously found, impliedly, against the plea of prescription, and that the decree is erroneous in that it does not adjudicate that a right by prescription was acquired, which right should be adjudged to be superior and paramount to the rights of all the other parties (with certain exceptions referred to in the argument), and that an injunction be awarded accordingly; the decree being claimed to be erroneous in enjoining the

appellants as against the parties adjudged to be prior in right.

No effort is made in the specifications, and only most indefinitely elsewhere, to point out wherein the decree sought to be reviewed is erroneous, but it is to be gathered from the brief, as a whole, that relief along the lines indicated is looked for. And this because, as it is asserted, appellants' predecessors in interest took out ditches for mining purposes in 1867, used the waters for such purposes for many years, during all of which time the water flowed back into the creek, and was re-captured by the respondents, who used it for agricultural purposes, until about 1880 when the owners of the mining rights conceived they could carry the water away from their workings for purposes of irrigation, which they did as to part, and that continuing to do so, a right to use the waters in the quantity thus devoted, originated and ripened by prescription into an easement so to do.

But surely no such contention is anticipated in or covered by the pleadings.

The pleading of appellant Williams is more specific than that of Kitto. It avers that the ditches upon which he relies were taken out for mining and agricultural purposes,

Transcript, page 60,

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that it was then the purpose of the appropriators to use the water appropriated for irrigation, and that 1200 inches of it, after being used for mining purposes, were re-captured before returning to the creek, and so used.

These averments are followed with general allegations intended to assert a prescriptive right, heretofore canvassed, averring that the appellant Williams and his predecessors in interest have had the adverse possession and enjoyment of 1200 inches of the waters of Crow Creek.

It will be unnecessary to inquire, at least at this time, how far the findings, express or implied, sustain the averments of the cross-bill or counter-claim of the appellant Williams, other than the averment of the prescriptive right. No complaint is made as to any findings which the court did make with reference to them, either express or implied.

It seems to be conceded by the brief, however, as all the evidence tended to establish, that the ditches upon which appellants rely were originally taken out for mining purposes solely and without any thought of the waters being used for any other purpose.

Now it is submitted that every averment of the paragraph intended to assert a prescriptive right would be fully met if none of the water had

ever been used for any purpose except for mining. If water to the full capacity of the ditches had regularly come down to the diggings and had there been used and had been then allowed to flow back into the creek, the appellant could still say that he and his predecessors in interest "since the date of the appropriation of said waters" "have had the continuous, exclusive, uninterrupted, peaceable, notorious and adverse enjoyment and possession" of twelve hundred inches of the waters of Crow Creek. They certainly could enjoy and possess the waters as effectively if they were used for mining purposes as if used for irrigation.

If they were used for mining purposes, it is readily conceivable that the respondents would not be deprived to any appreciable extent of the use of the waters. In fact, it is conceded that the use of these particular waters for mining purposes in no way interfered with any use the respondents had for them. If any of the respondents had gone above the points of diversion from which the ditches of appellants' predecessors were supplied, and had endeavored to turn the water into ditches there originating, the latter could in such event, insist that they had acquired a prescriptive right to the water, and were entitled to have it come down to them.

A prescriptive right to water can be acquir-

ed for mining purposes as well as for irrigation, and a right for mining acquired by prescription may or may not interfere with the use of the water for irrigation, depending on whether the diversion for agricultural purposes is to be accomplished above or below the point at which the waters, after being utilized in mining operations, are returned to the stream.

So one may acquire the right to divert water for milling purposes—the development of power—by prescription; but such right would be exercised without any injury whatever to agricultural appropriators diverting below the outlet of the tail-race.

So when one says that he has had for twenty years the continuous, exclusive, uninterrupted, peaceable, notorious and adverse enjoyment and possession of the waters or any portion of the waters of a stream, he has not stated facts which will entitle him to divert such waters and to consume them in the use to the deprivation of lower users.

It is only when he has made such a use of them as that the lower appropriators have been deprived of their use, for the period of the statute, that he is entitled to continue on the ground of prescription to deprive them of such use. And manifestly if he desires a decree which will per-

mit him to continue so to divert and consume the waters, it is not sufficient for him to say that he had the adverse "enjoyment and possession" or user of the waters for the statutory period or longer, but he must aver either that by reason of such "enjoyment and possession", or user, his opponent was deprived of the use, or he must aver such a use openly, notoriously, continuously, exclusively and adversely, of so much of the water and in such manner as resulted necessarily in depriving the other party of the use of the same.

It would be of no benefit whatever to the appellants if the court had made a finding in strict accordance with the averments made by them as the foundation of their claim of a prescriptive right, as quoted in the brief at pages 4 and 5. If there were a finding in the language of the pleading it would not justify a decree such as they desire should be entered, because it would not be inconsistent with the idea that the "possession and enjoyment" referred to was the use of the water for mining, milling or some other purpose which did not interfere with respondents' ability to divert and use the water below as they willed.

And no complaint is made to this court, nor any request addressed to it, except in respect to a finding in the language of the pretended



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plea of prescription, found in the answer and counter-claim of the appellants.

To enforce the argument above addressed to the court, it is referred to the language of the plea of prescription interposed in the case of

Union Mill & Min. Co., vs. Ferris (F. C.  
14,371), 24 Fed. Cas. 594-598,

which reads as follows:

“That for more than five years prior to the commencement of this suit, he has, during the irrigating season of each year, under claim of right, openly, continuously and peaceably, and adversely to the complainant and all persons whatsoever, used the waters of said Carson river in irrigating said land, and the crops of grass, grain and vegetables grown thereon, and for stock and domestic purposes; whereby defendant has acquired the absolute and exclusive right to use a part of the water of said Carson river in manner and for the purposes aforesaid.”

It will be observed that the plea avers that the waters were *used* for irrigation and domestic purposes, and, in consequence, a right was claimed to continue to use them for such purposes.

It is an axiom of the law that “the right acquired by prescription is only commensurate with the right enjoyed.”

Boynton vs. Longley, 6 Pac. 437.

“A right of prescription is limited by the *character* and extent of the user during the period requisite to acquire the right.”

Chessman vs. Hale, 31 Mont. 577-584.

If, accordingly, a party desires to claim a right by prescription to use water for irrigation, he ought to show a prescriptive use for irrigation, as was done in the Union Mill case, *supra*, or at least a use for such purpose and in such manner as deprived the party against whom the right is asserted of its use.

Indeed, the decisions of this court seem to make it imperative that it be averred that by reason of the use by the party claiming the prescriptive right, of the water, his opponent was deprived of the water at a time when he had need of it.

It was so held in Colorado. In the case of

Church vs. Stillwell, 54 Pac. 395,

the supreme court of that state said:

“It is not enough to simply assert that, by usage for a certain period of years, he has acquired and holds the right of prescription. That is simply a statement of a legal conclusion. There are other facts essential to the acquirement and existence of the right by prescription, if it can be so acquired at all; and it is equally as neeces-

sary that they should be stated in the complaint as it is that, in a suit to establish the priority of a right to the use of water, the facts constituting such priority must be specifically alleged. Counsel for plaintiff seems himself to recognize the necessity of such pleading by saying: 'The law in the western states where agriculture is carried on by means of irrigation recognizes a prescriptive right to the use of water after the claimant has been in the open, notorious, continued, uninterrupted and adverse possession of the right for a period of time corresponding to the time fixed by the statutes of limitation as a bar to entry upon land.' The complaint does not set forth the facts which counsel himself says are necessary to constitute the prescriptive right. It is true that he alleges his possession and use from 1872 to 1892 to have been adverse, *but he does not set forth any facts showing it to have been adverse. For aught we know from the complaint, there may have been sufficient water in Coal Creek during those years to have supplied all of the reservoirs belonging both to plaintiff and defendants. If this were the case neither party could have initiated or acquired a prescriptive right by having its reservoir first filled. Such action, under such circumstances, would not have been the assertion of a claim of right adverse to the others. It would not have been an*

invasion of the rights of the others, for which they might have maintained an action, even had their rights been prior and superior to that of the party whose reservoir was first supplied."

It has further been held that a pleading not so averring the facts is bad as stating merely a conclusion of law.

McCloskey vs. Barr, 38 Fed. 165-172.

We have endeavored to show that the attempted pleas of prescription are fatally defective not only in mere matter of form but in matter of vital substance. Only defects of *form* or in such matter as could be cured by a verdict or finding in favor of the *prevailing* party is waived by pleading over. Insufficiency in *substance* cannot be cured by a verdict or finding even in favor of the prevailing party (Bohn v. Dunphy, 1 Mont., p. 344), and of course it cannot so operate to relieve the *defeated* party. The court will not read into a pleading a *substantial* averment which has been omitted (Conrad Bank v. Railway Co., 24 Mont., 182), and it is not necessary to cite any of the well-nigh innumerable cases holding that the objection for want of substance in a cause of action attempted to be pleaded may be urged for the first time in the reviewing court (Sec. 6539, R. C. of 1907), unless there has been a waiver of the objection or there

has arisen an estoppel against the making of it. These respondents may object in this court, and for the first time, that the pretended plea of adverse possession is bad for want of substance, and such objection should be entertained and sustained. If respondents had done or omitted to do anything which would amount to a waiver or an estoppel, we admit that they could not now successfully attack the answer of Williams and Kitto for lack of pleas setting up prescriptive rights. Respondents, however, have not waived their right now to object, nor have they estopped themselves so to do. They are not in the attitude of a party who, by failure to demur or object to evidence in support of a *defective denial*, has waived his right to benefit by such deficiency (*Hogan v. Shuart*, 11 Mont. 498); nor are they in the condition of a plaintiff who, by failure to move to make more *certain* averments in an answer where the uncertainty is cured by the evidence and findings, has waived the objection which he might otherwise have insisted upon (*Raymond v. Wimsett*, 12 Mont. 551); nor does the question, as presented in this case, fall within the doctrine that admissions or statements in the answer or reply may supply defects or ambiguity in the complaint or answer (*Hamilton v. Railway Co.*, 17 Mont. 334, *Hefferlin v. Karlman*, 29 Mont. 139, *Harmon v. Fox*, 31 Mont.

324), nor to cases where defective or insufficient denials are cured by a verdict or findings for defendant (*Orr v. Haskell*, 2 Mont. 229), nor to a case where a pleading is merely ambiguous and uncertain, but not so faulty in these respects as to justify discarding the averment altogether (*Spencer v. Ry. Co.*, 11 Mont. 166), nor to cases tried on the theory that insufficient or fatally defective denials or attempted averments of new matter are good or sufficient (*Sweeney v. Ry. Co.*, 11 Mont. 553, *Hamilton v. Huson*, 21 Mont. 13.)

By omitting to object at the trial to evidence which appellants assert establish prescriptive rights in them to the waters, these respondents in no wise and to no extent waived the failure of appellants to plead prescriptive rights, nor cured the fatal defects in that which appellants now assert to be a plea of title by adverse *possession*. Appellants pleaded rights and titles by *appropriation*, to prove which *all* the testimony adduced by them was relevant and material evidence. The burden was upon them to prove by proper evidence prior appropriation and diversion, as well as the application and use of the waters for beneficial purposes. That evidence was also relevant and material to establish the *extent* of the application and use, and it was also pertinent with respect to the *means* of diver-

sion and that appellants had not abandoned their pretended rights acquired by *appropriation* and diversion,—in short, *all* the evidence was admissible and pertinent to prove the averments setting up, by way of counter-claim, their appropriation and title resulting from appropriation and user; every word of the evidence was relevant to the properly pleaded rights by appropriation. Now, conceding (for the purpose of argument only) that this evidence tended *also* to establish prescriptive rights, manifestly respondents would not have been heard to object to its reception on the ground that there was no plea of prescriptive rights, for, the evidence being admissible and pertinent to establish rights by *appropriation*, and the maintenance of them down to the time of the trial, the fact (if it be a fact) that the evidence tended to prove a counter-claim *not pleaded*, furnished no conceivable reason or basis for objecting to its reception. Evidence offered which is admissible on *any* ground must be received, objection thereto must of necessity be idle and futile, and when received its effect is confined to the issue to which it is pertinent, and may not be utilized to prove a matter not within the issues framed by the pleadings. This is not a new question. It received consideration in *Finch v. Kent*, 24 Mont. 268. There the plaintiffs sought, by a creditor's bill, to set aside

as *actually* fraudulent a sale of personal property made by the debtor to his wife. This court, on pages 273 and 274, said this, among other things:

“If the vice which renders the sale null as to them was the existence of *actual* fraud, the complaint must, as the complaint in this case does, charge its presence. If the vice was *constructive* fraud, then it is incumbent upon the plaintiffs to state the matters which constitute that cause of action. Of course, both actual and constructive fraud may be pleaded in the same complaint, but if actual fraud only be set up, then, although proof of constructive fraud may be evidence having the tendency to support the allegation of actual fraud, yet the finding of constructive fraud is not of itself sufficient to support a judgment, for the allegations and proofs must correspond. Evidence tending to show want of change of possession may be introduced upon the issue of a personal intent to defraud. Such evidence is not obnoxious to the objection of incompetency or of irrelevancy, and therefore its reception without objection would not be deemed a waiver by the defendants of their right to insist that the judgment shall be based upon the questions presented by the pleadings; in other words, by the admission of such evidence without objection, the defendants are not to be considered as having consented to a trial of the issue of constructive fraud. When a cause is tried upon the theory, adopted by the losing party, that a certain question not presented by the pleadings was in issue, and the issue is decided, the judgment will not be rever-



sed for that reason; it does not appear, however, in the case at bar, that the evidence touching the want of a continued possession in the purchaser was adduced for any purpose except as tending to prove fraud in fact, and the defendants do not seem to have had their attention directed to its bearing upon constructive fraud (the existence of which was not suggested by the pleadings) until the motion was made upon that ground for judgment, which was granted without hearing argument, the defendants excepting. The finding of constructive fraud was not responsive to the issues. The judgment, therefore, in so far as it is based upon the existence of mere constructive fraud is erroneous."

Nor does it lie in the mouths of appellants to assert that respondents had notice, by the attempted or pretended pleas of adverse possession and enjoyment, of their intention to adduce evidence to support prescriptive rights. Their answer does not, as has already been remarked, set up any adverse or hostile user for the period prescribed by the statute, and in addition to this it will be observed that, although adverse possession, or the Statute of Limitations, is an affirmative defense (or, as here, a counter-claim and not a defense) and can be taken only by answer (Revised Codes of Montana, Sec. 6475; *Grogan v. Ry. Co.*, 30 Mont., at page 246), and although Section 6549 of the Revised Codes prescribes that each defense or counter-claim

must be *separately stated and numbered*, what is now claimed by appellants to be pleas setting up prescriptive rights are found only in those subdivisions of their joint answer which are devoted chiefly (if not altogether) to pleading rights by appropriation, diversion and use down to the time of the trial, and such pretended pleas are neither separately stated nor numbered at all. The counter-claims setting up prior appropriations are logically and in the law utterly distinct from counter-claims setting up title or rights by prescription. *Each* counter-claim is a separate cause of action, and must be separately stated and numbered. In these circumstances it is not unreasonable to indulge the presumption that respondents were not advised of appellants' intention to offer evidence at the trial in support of such pleas. It is the more reasonable presumption (and all reasonable presumptions must be indulged in favor of the findings and decree) that there is not sufficient in the answers to have put respondents upon notice that appellants would insist upon prescriptive rights, and that if respondents had been sufficiently advised by the answer of such intention they would have been prepared with such opposing evidence as the facts would warrant. Since *all* the testimony was relevant upon the issue of appellants' proir *appropriation*

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and *user* as appropriators, it is but rational and just to assume that respondents believed such evidence was introduced for that purpose *only*. This court said in *Babcock v. Maxwell*, 29 Mont., on page 33, that a counterclaim must be so denominated in the answer in order to be treated as such by the court. The theory upon which this doctrine rests (in addition to the requirements of Section 6549, *supra*), is that the plaintiff is entitled to know just what issue the defendant as an actor intends to raise or tender, and just what affirmative relief he desires to obtain. Now, in a water right suit, all the parties, except those disclaiming, are actors, each being a plaintiff against the other and each being a defendant with respect to the other; and a counterclaim pleading adverse possession or user or prescription for the statutory period, is a cause of action existing in favor of the defendant and against the plaintiff, and must of itself contain *all* the elements of a *cause* of action. In the present case, however, pleas which appellants now assert to be pleas of adverse possession (rather than prescription) may be said to express what appellants claim was done to *pre-serve* their rights acquired by *appropriation*.

## II.—THE EVIDENCE.

Assuming that the pleading would warrant the relief to which the appellants conceive

themselves, as it is to be gathered from the brief as a whole, to be entitled, the inquiry is presented as to whether the *evidence* is of such a conclusive character, so complete in meeting the requirements of a plea of prescriptive right, so persuasive in character as that the court ought to reverse the conclusion reached by the trial court on that branch of the case.

In the first place it must be borne in mind that the law exacts a strictness of proof as to a claim of this character of peculiar severity.

In the Union Mill case above referred to, Hillyer, D. J., with whom concurred Circuit Judge Sawyer, whose views upon matters of this character are entitled to especial consideration, said of the claimant of a prescriptive right to the use of water, that "The burden of proof is on him, and he must establish his adverse enjoyment in *the most satisfactory manner*."

And in the case before him he ruled against the claim because the defendant asserting it had failed to make it good by "clear and unequivocal proof."

24 Fed. Cas. 599.

To the same effect speaks the supreme court of Colorado.

Evans vs. Welch, 68 Pac. 776.

Tested by the rule thus declared, and similar expressions from many courts indicating how the trial judge should be guided in passing upon evidence claimed to establish a right to water by adverse user, the learned trial judge, enjoying the advantage of an unusually extensive experience in the trial of water right cases, was amply justified in declining to adjudge to the appellants superior rights by adverse user.

The respondents, naturally enough, take quite a different view of what the evidence in the case establishes, from that expressed in the brief of appellants as to what "the evidence uncontradictedly shows."

The situation is peculiar. It is claimed that the water was taken from the creek by what is known as the mining ditches, then caught again and thrown into Keating gulch; that a dam had been constructed across Keating gulch and that the ditches through which the prescriptive right is claimed carried away the water thus intercepted.

There is no pretense that there is any direct proof in the record that the respondents were actually deprived of any water to which their appropriations entitled them, at any time when they had any occasion to use it. It seems to be conceded that during the early part of the season there

was water in abundance for all claimants. It is apparently claimed, however, that later on, at dates varying according to the season, and which the brief fixes as July 15th, all of the water of the creek was used by the appellants through their ditches. In the absence of any direct evidence whatever that the respondents did not have water when they needed it, so as to give them a right of action for damages against the appellants or their predecessors in interest, the effort is made to force that conclusion from what is claimed to be proof that appellants got all there was, so that the right of action must have arisen.

In

Talbott vs. B. C. W. Co., 29 Mont., 17, the court denied the claim of prescription because, as it said, "there is no showing whatever that such use [the use made by defendant] was had at any time when these plaintiffs had need of the water, or that the use of the water by the defendant *interfered* with its use by the plaintiffs."

Not only is there no direct evidence of any interference with the use of the water of the creek by the respondents, but the court found:

"That each and all of the parties who made appropriations of water within these findings set forth except those designated as

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for mining purposes, have used the same each year since the date of their respective appropriations, for the irrigation of their lands and the said respective amounts of water are necessary for the proper irrigation and cultivation of said lands."

Finding XL, Transcript page 205.

This finding is not in any way attacked by the appellants, and its recitals must be accepted as truths in the case. It follows, of necessity, that whatever water went to the appellants, the respondents equally enjoyed so much as was necessary to mature their crops, and it must be assumed that evidence was submitted to establish this finding of fact. The conclusion that the respondents were deprived of any water to which they were entitled, by the acts of the appellants, so as to give them a right of action for damages, by no means follows from the facts disclosed by this record.

From what is recited above, it will be seen that the appellants are required to establish, in order to afford any basis for the conclusion that the respondents were deprived of water to their injury, (1) that all the water of the creek was turned into the mining ditches through which appellants claim, and (2) that all of that water carried into Keating gulch, after being used for mining purposes, was intercepted by the dam

therein and turned into the ditches of appellants leading therefrom.

Immediately back of Radersburg, that is, to the west of it, is a high auriferous bench that is seamed by a number of parallel gulches leading into Crow Creek. Placer mining began in that neighborhood in the sixties, and has been carried on continuously since. The operations appear to have extended over the entire region along the gulches and the intervening portions of the bench. Among these gulches are Uncle Johnny's Gulch, Charity Gulch and Keating Gulch and tributaries of these, among others Lincoln Gulch and Ohio Gulch.

In addition to the so-called mining ditches through which the appellants claim, there is another large mining ditch spoken of as the Swede ditch, owned by the respondents Berg and Jahr, that is capable of carrying 200 inches of water, leading to the placer beds.

The mining operations carried on by means of the Swede ditch were conducted chiefly about the mouth of Charity Gulch, and it is undisputed that all of the water carried by that ditch was allowed to fall into Swamp Creek, a tributary of Crow Creek, from which it soon found its way into the main stream to be utilized by the respondents, appropriators below, in the same manner



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as all the water used for mining purposes had been made available to them prior to the construction in the early eighties of the Quinn ranch ditches, through which appellants assert their prescriptive right.

The evidence upon which appellants rely to establish the fact that all the water of the creek at the low stage was turned into the mining ditches through which they claim, save sufficient to satisfy the McKay, Hossfeld and Williams rights, comes to a very large extent from interested witnesses, and is unsatisfactory in that it appears that their opportunities to know whether all the water in the creek went into those ditches were, in a number of instances at least, most meager.

But as against such testimony, it appears in evidence that the Swedes (as they are called) carried on their operations as late in the season—into the month of August,—as did those operating by means of the other ditches, and that hay crops in that region matured by the middle of July. Not only that, but it affirmatively appears that not all the water diverted from the stream by means of the appellants' so-called mining ditches was intercepted and carried into Keating gulch, to be diverted into the farm ditches.

A slum dam had been constructed across Charity gulch to intercept what water was there used, and turn it again into a ditch that carried it into Keating gulch, but there was no slum dam in Uncle Johnny's gulch, and the water used for mining there escaped along the natural drainage into a swamp on Section 16, which gave its name to Swamp Creek, or Spring Creek, also called Muddy Creek, because the mine water ran into it, and which swamp drained into that creek.

Besides these sources of supply some water was used from the appellants' mining ditches on a bar above Radersburg, and fell from there into Swamp Creek. One witness tells that the mining operations were carried on until the ground froze in the fall, and another that the Swedes worked as late as the other people.

According to the testimony of another, there were no less than 1500 to 2000 inches of water available at the low stage.

Other testimony puts the amount in ordinary years at from 700 to 800 inches, but an exceptionally well informed witness says that the lowest stage does not arrive until the latter part of August or the first of September, when the irrigating season is over, and though he estimates the low stage at 800 inches he will

venture no figures on the flow at any time between the first of July, when the creek recedes, and the time when it is at its lowest.

But there is no sort of assurance that even all the water that went into or down Keating gulch was diverted into the appellants' farm ditches.

The dam across that gulch was equipped with a head-gate and the water was generally turned down the gulch at night. Besides, all of this water that was carried from the mines held tailings in suspension in such quantities, even when it got miles below on the ranches of appellants, as to interfere with cultivation. Keating gulch contributed its quota detritus, and all this naturally piled up against the dam. If there is any evidence that no water went over the dam, it is of the most equivocal character.

All this testimony, and more, easily explains how, notwithstanding the ditches from the slum dam in Keating gulch, the respondents could and did get water. In other words, it is impossible from this evidence to conclude that there was any time during the irrigating season that the appellants or their predecessors took all of the water of Crow Creek for irrigation or that the respondents were, during the period of the statute, or during any period, deprived of water when they needed it.

Following the example of counsel for the appellants, we have not specified any page and line of the transcript where will be found the testimony herein adverted to, but we refer the court generally to that of the following witnesses: J. C. Stewart, A. T. Duff, Thomas Williams, Henry Nicholson, Julius Hargrove, David Williams, James Wood, Chase Worden, Henry Raymond, Henry Pickell, Frederick Temple and James Williams.

Transcript, pages 245-387.

There is testimony further offered in rebuttal by the respondents, not only that water did go down Keating gulch—water accumulating there from the mining ditches, and other sources, in excess of what went to the ranches,—but to the effect that there was no dam at all in Charity Gulch until after 1895, prior to which time the mine-water in that gulch as well as in Johnny's Gulch flowed uninterruptedly along the natural drainage channels.

The Swede ditch and the ditches through which appellants claim are so closely associated that the latter often carry water through the Swede ditch intended ultimately to go to their ranches. This plan affords an easy opportunity for the appellants to get water that ought to go down to respondents and it is their claim that

the condition that precipitated this law-suit, arose because appellants were turning into Keating gulch not only all that came through their mining ditches, but more that came down through the Swede ditch and that consequently the wrongs of which respondents complain were of recent origin.

This part of the record further affords direct proof that, from the various sources of supply to which reference has been made, the ranchers in the valley below Radersburg did, in fact, get water ample to enable them to mature their crops annually, and that there was no substantial interference with their rights until a few years before the commencement of the action.

Testimony of Benjamin Townsley, (Trans. 424-429), A. Macomber, (Trans. 429-437), A. L. Wright, (Trans. 437-440), James Wood, (Trans. 440-444.)

But let us assume, for argumentative purposes, that the foregoing contentions are without merit, and that there was testimony to prove prescriptive rights and which did establish such rights *if the testimony clearly appears to be entitled to full weight and credit*,—that is to say, *if such testimony so appears to this court upon the printed record*. If this assumption be made respondents are nevertheless entitled to an ap-

proval of the findings and an affirmance of the decree, as we shall presently show.

The court will observe in the course of its persual of the testimony, that all the testimony tending to prove prescription was *orally delivered* by witnesses called by appellants. Some of these witnesses were parties, some though not parties were, as disclosed by the record, interested with or biased in favor of appellants, while one witness does not *appear by the printed* record of the proceedings at the trial to be other than indifferent. *But the court will note in its reading of the record, that the only witnesses whose testimony* (if believed) *can, by any possible interpretation, be deemed to prove prescriptive rights in appellants, were parties to the action whose interest it was to support appellants in their claim of prescription*, and that the testimony of the other witnesses, whether taken separately or in the aggregate, falls far short of establishing such claim. Now, the common law excluded from the witness-box all persons (with a few exceptions arising from necessity) who were parties to, or directly interested in the event of the cause, and the exclusion was based upon the theory that parties and persons interested were not entitled to credit, and also to “avoid the multiplication of temptations to perjury (1 Greenleaf Ev. §329). By virtue of statutes

abolishing disqualification for interest, such parties and persons are, of course, competent witnesses, but nowhere does the law declare that they are to be believed, nor do the courts say that their testimony must be taken as true though they be unimpeached and their testimony uncontradicted. Under the common law as well as under the enabling statutes, the *credibility* of a witness is *exclusively* for the consideration and determination of the jury if the cause be tried by jury, or of the judge if tried by the court. By what means is a court of error or appeals to reproduce or bring before it the demeanor of the witness, his manner upon the stand, his candor or lack of candor, his appearance, the tone of his voice, or the hundred and one items which, taken together as a composite whole, enable the *trial* jury or judge to decide *what* weight *they*, or *he*, shall accord to his testimony? The very dropping of an eyelid at a particular moment or question may justify the triers or trier of fact in giving no credit to the witness and attaching no weight to his testimony. Hesitation in respect of matters concerning which he should not hesitate, apparent unwillingness to answer questions on cross-examination, his attempts at evasion, and his conduct generally upon the stand, are potent factors with the jury or judge, but cannot be presented

to the higher court. The question is discussed by Chief Justice Daly in *Nicholson v. Conner*, 8 Daly, 212, thus:

"The rule laid down in *Newton v. Pope* (1 Cow. 110.), that where a witness is unimpeached, and the facts sworn to by him are uncontradicted, either directly or indirectly by other witnesses, and there is no intrinsic improbability in the relation he gives, his testimony cannot be disregarded by the court or by the jury, prevailed, as has been pointed out by Rapallo, J., in *Elwood v. The Western Union Telegraph Co.* (45 N. Y., 554), when parties were not allowed to give testimony in their own causes and where any one having the slightest pecuniary interest in the matter in controversy was also vigorously excluded, and is was even then subject to considerable qualification. Now that the law has been changed and parties may be witnesses in their own cases, this rule has not the force that it formerly had; and when a party in the cause goes upon the stand as a witness, his credibility is *necessarily* [Judge Daly's italics] *a matter of consideration*, for he has a direct interest in the whole subject matter, and where, as in the present case, the proof of the existence of a cause of action rests upon the testimony of the plaintiff alone, it is better that a jury should weight and pass upon it than that the court should assume that it must be true because there was no conflicting evidence. There may be no evidence directly contradicting such a witness; but it does not follow from that that his statement must be true. There may be an exercise of judgment in respect



to his testimony;—its consistency, its probability, and the manner in which he gives it; for the look, voice, bearing and whole demeanor of a witness frequently indicate what weight should be given to his testimony, or whether it is entitled to any. I have tried causes in which witnesses have come upon the stand and given testimony which was not contradicted, who were not believed either by the court or by the jury, and this has been a not unfrequent experience. There has been something not easily described, but readily recognized, in the bearing and manner of the witness that carried conviction to the minds of all who heard him, that he was not swearing to the truth.

“It is unnecessary to comment upon the strong disposition which a party has to establish his cause of action or defense, and the temptation he is under to color, pervert, or subvert, the truth.\*\*\*\*It is safer, where a cause of action or defense rests solely upon the testimony of a party, to leave it to the twelve minds that constitute the jury to determine the weight or value to be attached to it, than to assume, as a rule of law, that it must be true because it was not contradicted.”

That case was cited with approval in *Kearney v. Mayor*, 92 N. Y., 617, 621.

In *Ract v. Duviard-Dime*, 4 N. Y. Supp. 156, the Supreme Court said:

“Some other charges were brought forward in the course of the trial, dependent wholly upon the testimony of the plaintiff for their support. But no legal error can be held to have been made by the referee in disallowing them, for he was not conclusively bound by the evidence of the plaintiff, even where it was not contradicted

by the defendant or any other witness. But his evidence was still subject to the infirmity that it might be rejected by the referee on account of his interest as plaintiff in the action. [Citing cases.]”

In the personal injury case of *Meeteer v. Ry. Co.*, 18 N. Y., Supp. 561, the plaintiff testified in her own behalf, and was not contradicted or impeached, but the court held that the trial court erred in declining to charge that the jury had the right to reject the whole or any part of her testimony, because she was pecuniarily interested in the result.

In another personal injury case—*O'Neill v. Ry. Co.*, 28 N. Y. Supp. 917, it was held that where a plaintiff is a witness in his own behalf, a verdict for defendant will not be disturbed on appeal as against the weight of evidence, as the uncontradicted testimony of a party is not controlling, even though his evidence is well within the probabilities and he is not impeached.

In an action upon a note the court in *Olsen v. Ensign*, 28 N. Y., Supp. 38, declared that the uncontradicted testimony of the defendant was not conclusive, and the trial court was not bound, as matter of law to regard it, but might reject it *in toto*, as the trial court had done.

Other cases too numerous to cite are to the same effect. Some of them will be found in 30 A. & E. Enc. Law, 1094, and notes in same volume, on page 1068. Especially does the rule apply where, as here, all the testimony was *viva voce*. (30 A. & E. Enc. Law, 1068, note 2.)

The doctrine applicable to parties as witnesses is obviously likewise applicable to persons who are not parties but are in-

terested in the event either pecuniarily or by reason of bias or prejudice. It may be noted parenthetically that many courts carry the rule to its logical conclusion by holding that the creditability of *any* and *every* witness is a question exclusively for the jury or trial court, upon the theory that the appellate court cannot put itself in the place of the triers of fact who have seen, observed, and heard the witness (30 A. & E. Enc. Law, 1068, and note 2.)

We therefore submit that the judge of the District Court may not be declared to have erred when he gave to the interested witnesses such credit as to him they appeared to deserve.

### III.—THE BURDEN OF PROOF.

The burden is upon the appellants to establish their affirmative allegations .

Revised Codes, Sec. 7972.

To establish the right to the use of water by adverse user, if properly pleaded, the burden is upon the party asserting that right to establish by a preponderance of evidence,

1. That the water was used for a full period of ten years.
2. That during that period, it was applied to a beneficial use.
3. That such use was hostile, open, notorious and continuous.

4. That it was so used under a claim of right with the intention of establishing title thereto.

5. That such use was adverse to the other parties in this: that they were deprived of the use of water at a time when they required it for the purpose of irrigation or other beneficial use.

6. That they had notice of such adverse user and claim.

The evidence heretofore discussed, shows that the appellants failed to establish any of these elements.

The rules relating to acquiring the right to use water by adverse user, are the same as for acquiring title to real or personal property by adverse possession, with these exceptions: (1) That a person cannot acquire ownership of water and can only acquire the right to use it by applying it to a beneficial use, mere possession giving no right or title. (2) The water must be used during the time of prescription at a time when the other party requires it for the purpose of applying it to a beneficial use; his rights must be invaded in such manner as to give him a cause of action.

The general rule of evidence is stated by Mr. Elliott in his work on Evidence, Section 1615:

“The burden of establishing adverse possession is upon the party who relies upon it. He must ordinarily show the existence of every element necessary to constitute adverse possession.”

The evidence to sustain such right must be clear and positive. It cannot be sustained or made out by inference or presumption.

Kurz v. Miller, 62 N. W. 182.

Ayers v. Reidel, 54 N. W. 588.

Dhein v. Beuscher, 53 N. W. 554.

Nothing must be left to conjecture or presumption.

Keller v. Cohen 158 N. Y. 299.

Such possession must be to the exclusion of all others.

Ward vs. Cochran, 150 U. S. 697.

An entry or use must be open and notorious to give the owner notice of hostile claim.

Milot vs. Lagomarisino, 38 Pac. 308.

The same rule prevails in water right cases.

In the case of the Union Mill and Mining Company vs. Dangberg, the court said:

“An adverse use of water for the statutory period must be open, notorious, peaceable, con-

tinuous, and under claim or color of right; for, if any act is done by other parties claiming the water that operates as an interruption, however slight, it prevents the acquisition of any adverse right"....."The burden of proving an adverse uninterrupted use of water, with the knowledge and acquiescence of the party having a prior right, is cast on the party claiming it."

Long on Irrigation, Sec. 92.

One of the essential elements to prove is that the water was applied to a beneficial use.

In this state no right can be acquired to the use of water except for a beneficial purpose.

Revised Codes, Sec. 4811.

Power vs. Switzer, 21 Mont. 529.

Toohey vs. Campbell, 24 Mont. 18.

Miles vs. Butte City Electric Co., 32 Mont. 67.

Lavery vs. Arnold, 57 Pac. 906.

Senior vs. Anderson, 47 Pac. 454.

Long on Irrigation, Sec. 90.

Another essential element to prove is that during the time the water was used, others required it for use and were deprived thereof, such an invasion of their rights as would give them a right of action against the party using it.

In Talbott vs. Butte City Water Co., 29

Mont. 17, the court said:

"The testimony offered on behalf of the defendant shows that for five years prior to the commencement of this action, the defendant and its predecessor in interest had used some and at certain times all, of the waters of Black Tail Deer Creek, at least a portion of every year; but there is no showing whatever that such use was had at any time when these plaintiffs had need of the water, or that the use of the water by the defendant interfered with its use by the plaintiffs prior to the year 1891, while this action was commenced in 1893. In order that the use of the water by the defendant company might ripen into a right by adverse user, as against the plaintiffs, such use must have been open, notorious, continuous, adverse and exclusive, under a claim of right. (Long on Irrigation Sec. 90, p. 160; Cox v. Clough, 70 Cal. 345, 11 Pac. 732). It is not sufficient for defendant company to show that its use of the water was open, notorious, continuous, but it must show that such use was adverse—that is its use of water must have been such an invasion of plaintiffs' right to its use, as that they could have maintained an action against the defendant for such invasion; and such adverse use must have been continuous for a period of time equal to the period of the statute of limitation, which in this instance was five

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years. (Yankee Jim's Union Water Co., v. Crary, 25 Cal., 504, 85 Am. Dec. 145). This doctrine is too well established now to be open to serious controversy. (Long on Irrigation, Sec. 90; Faulkner v. Rondoni, 104 Cal. 140, 37 Pac. 883; Smith v. Logan, 18 Nev. 149, 1 Pac. 678; Alta L. & W. Co., v. Hancock, 85 Cal. 219, 24 Pac. 645, 20 Am. St. Rep. 217.)

The plaintiffs had use for the water only for agricultural and mining purposes, and, when not so using it, the law required them to turn it back into the stream for the use of this defendant, or any other person or corporation which might have a right to its use. No use of water by a subsequent appropriator can be said to be adverse to the right of a prior appropriator, unless such use deprives the prior appropriator of it when he has actual need of it. To take the water when the prior appropriator has no use for it, invades no right of his, and cannot even initiate a claim adverse to him."

In Norman vs. Corbly, 32 Mont. 202, the court said:

"Respondent claims that by continual user of one half of the waters of Corbly creek since 1873, he has acquired a prescriptive right to continue the use thereof. Neither party could acquire any title to the corpus of this water, but



only to the use thereof. (Civil Code, sec. 1880; Middle Creek Ditch Co. v. Henry, et al, 15 Mont. 558, 38 Pac. 1054.) So long as the plaintiff had all the water his necessity required he could not complain, nor raise any question as to the right of the defendant to use all that remained. In order to obtain a right by prescription, it is necessary that during the prescriptive period an action could have been maintained by the party against whom the right is claimed. (Chessman v. Hale, 31 Mont. . . . . 79 Pac. 254; Church vs. Stillwell, 12 Colo., App. 43, 54 Pac. 395.) There is no evidence in this record that plaintiff did not have all the water required for his own use from the date of its appropriation to the time this dispute arose, and the claim of a prescriptive right cannot be maintained."

It is contended that the burden is upon the respondents to prove that during the alleged use by the appellants, they were not deprived of water and two cases are cited to support that proposition. The arguments and citations on that point are similar to those in appellants' brief in Wright vs. Cruse, 95 Pac. 370. The court refused in that case to follow those decisions, though a much stronger case was made than is here presented to sustain the claim of adverse user.

In the case of Gardiner v. Wright, 91. Pac.

286, relied upon by counsel, it was shown that the party had used the water for forty years and during that time at certain periods the other parties were deprived of water and could not raise crops. In that case the party made open manifestation of his claim to all the waters.

In a later case, *Watts v. Spencer*, 94 Pac. 39, the Supreme Court of Oregon said: "The acts by which it is sought to establish a prescriptive right must be such as to operate as an invasion of the right of the person against whom the prescriptive right is asserted and will give a cause of action in his favor (Long on Irrigation, sec. 90) ; "No adverse user can be initiated until the owners of the superior right are deprived of the benefit of its use in such a substantial manner as to notify them that their rights are being invaded." According to this later decision, it is necessary for the party to establish such user as deprives the others of the use and in such a manner as to notify them that their rights are being invaded. There is no such proof in this case. Indeed this is the rule in Oregon (see *Britt v. Reed*, 70 Pac. 1029). The same rule is announced in many other Oregon cases. The language quoted by counsel in *Gardiner v. Wright* is applicable only to the peculiar facts in that case.

Counsel also cites *Gurnsey v. Antelope Creek Co.*, 92 Pac. 326.

In that case the court found that for eleven years the plaintiff used the water openly, notoriously, peaceably and adversely to the defendant and the whole world, claiming all the time to be the owner of the right to take and use it continuously. It appeared that the plaintiff's pipe tapped the city water main and conveyed the water across the road and it was shown that the employees of the defendant passed up and down that road along the pipe line at various times during each year, and must have had notice of the use.

After commenting upon the findings of the trial court, the Supreme Court said: "If there is any substantial evidence of every element of adverse use the findings of the court below are conclusive." The court thus recognized the general rule that it is necessary to establish by substantial evidence every element of adverse user. In many other California decisions, the same rule is announced, so that the seeming departure from the general rule in the case cited by counsel, was only after the plaintiff had by substantial evidence proven every element necessary to establish a right by adverse user. In the case at bar, the appellants did not establish by substantial evidence or any evidence, any of the elements of adverse use.

The court, after hearing all of the evidence, found against the claim of adverse user, and found (paragraph 50, page 205, Tr.) that all the parties used the water each year. This

court must presume that the finding is based upon substantial evidence.

We respectfully submit that the judgment and the order denying a new trial should be affirmed.

Respectfully submitted,

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102 Pac. 336.

IN THE  
SUPREME COURT  
OF THE  
STATE OF MONTANA

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STATE OF MONTANA ex rel ROBERT GREGG  
et al.

Relators,

vs.

JOHN E. ERICKSON et al.

Respondents.

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BRIEF OF RELATORS.

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This proceeding challenges the existence of an act creating Lincoln County.

At the last session of the legislature a bill was introduced to create Cabinet County. It went to the committee of the Senate on Counties, Towns and Municipal Corporations. That committee reported and recommended that the bill be printed with certain amendments, one of which provided for a change in the boundaries, and the other in the name of the proposed county from Cabinet to Lincoln.

The report was adopted, the bill with the amendments printed, and eventually it was put upon its

final passage, was passed, and concurred in by the House.

A copy of the bill as printed, that is, as though it designated the county which it purported to create as Lincoln, and fixing the boundaries in accordance with the amendments originating with the committee, became the basis for an enrolled bill, which was sent to the governor, but this supposed enrolled bill differed from the printed bill in that there were omitted from it twelve lines of the bill as printed, and parts of two other lines.

In this form the enrolled bill was signed by the Governor. The omitted matter is as follows:

“Nine hundred dollars.

Public Administrator,	as provided by law.
Surveyor,	as provided by law.
Coroner,	as provided by law.

Said salaries shall commence when said Officers shall enter upon their respective duties, and shall not be increased until the assessed valuation of said Lincoln County is more than Four and less than Six Million Dollars, when said salaries shall be for said respective officers as provided in Section . . . . of the Revised Codes of 1907 of the State of Montana.

“Section 12. That at their first meeting the said commissioners of Lincoln County, are empowered to subdivide said County into municipal townships, and establish road districts, and they are hereby authorized to appoint two justices of the peace and two constables, for each municipal township, and road supervisors for each road district, when

required.”

In explanation it should be said that the words “Nine Hundred Dollars” with which the omitted portion commences formed the last half of one line, of which the first half was “Superintendent of Schools,” the preceding portion of the section being as follows:

“Section 11. That the Officers appointed and mentioned herein in Section 10 of this Act, shall each be allowed to receive an annual compensation for their services as such officers, as follows, to-wit:

For each County Commissioner, the sum of Six Dollars (\$6.00) per day, when in actual session, not exceeding the sum of Two Hundred and Fifty Dollars (\$250.00) per year.

Treasurer	Twelve Hundred Dollars.
Sheriff,	Fifteen Hundred Dollars.
Clerk and Recorder,	Twelve Hundred Dollars.
Assessor,	Twelve Hundred Dollars.
Clerk of the District Court,	
	Twelve Hundred Dollars.

Superintendent of Schools,”

It is insisted:

1. That the amendments reported by the Senate Committee were never adopted.
2. That the bill which passed, even if such amendments were adopted, so as to be incorporated in the bill, was never signed by the Governor; in other words, there is a fatal variance between the bill which passed and the enrolled bill bearing the executive signature.

## I.

## WAS THE ORIGINAL BILL AMENDED?

It is submitted that the record does not show that the amendments proposed by the Senate Committee were ever adopted, or that they ever became a part of the bill. The committee recommended that the bill be printed with certain amendments and that report was adopted. This certainly did not adopt the amendments any more than it adopted the bill. Had the committee recommended that the bill be amended in certain particulars, *and that as amended*, it be printed, and such a report had been adopted, the amendments would have been a part of the bill. But nothing of the kind was done. They simply recommended that the bill be printed with certain amendments, apparently, *for the information* of the house, so that members might have an opportunity to study the bill as it should appear if the amendments coming from the committee should be adopted.

Clearly the committee recommended only one thing, namely, printing. The only thing the House did was to authorize the printing of the bill with the proposed amendments. The committee did not even recommend to the House that the amendments be adopted, it recommended that they be printed along with the remainder of the bill, as though they formed a part of it. The bill which passed the Senate, accordingly, was essentially



different from either the bill that passed the House or the bill that was signed by the Governor.

## II.

### VARIANCE IN THE ENROLLED BILL.

But if this view is not correct, still the bill which was signed by the Governor was substantially different from the bill that was passed by both houses. The bill they passed was never signed by the Governor. The bill the Governor signed was never passed by the Legislative Assembly.

The question presented has been before the courts for adjudication repeatedly, and the authorities are apparently uniform to the effect that if there is any substantial difference between the bill as it was passed by the legislative body and the enrolled bill which was signed by the Governor, there is no new law.

The following are direct decisions on the proposition:

Woody v. State, 48 Ala. 115.

Legg v. Mayor, 42 Md. 203.

Brady v. West, 50 Miss. 68.

Smither v. Campbell, Land Com'r. 41 Ark. 475.

People ex rel Dietz v. DeWolf, 62 Ill. 253.

Mogg v. Randolph, 77 Ala. 597.

Sayer v. Pollard, 77 Ala. 608.

Jones v. Hutchinson, 43 Ala. 721.

Steen v. Leeper, 78 Ala. 511.

Berry v. Baltimore Co., 41 Md. 446.

**State ex rel Att'y Gen. v Hagood**, 13 S. C. 46.

**Prescott v. Board of Trustees**, 199 Ill. 324.

**State ex rel Boyd v. Deal**, 24 Fla. 293.

**Yancey v. Wadell**, 36 So. 733.

**King Lumber Co. v. Crow**, 46 So. 646.

**Dow v. Bendleman**, 5 S. W. 297.

**Moody v. State**, 17 Am. Rep. 28.

**Rode v. Phelps**, 45 N. W. 493.

**State v. McClelland**, 25 N. W. 77.

**State v. Wendler**, 94 Wis. 369, 68 N. W. 750.

**State v. Swan**, 7 Wyo. 166, 75 Am. St. 889-901.

Even a lack of conformity between the title of the enrolled bill signed by the Governor and that which passed the assembly vitiates the measure.

**Simpson v. U. S. Y. Co.**, 110 Fed. 799.

### III.

#### IS THE VARIANCE MATERIAL?

**Weis v. Ashley**, 81 N. W. 318.

The omission of words from the enrolled bill, which, if incorporated, would not change the substance or effect of the statute as it passed the legislature, will not invalidate the act.

**Sharp v. Merrill**, 43 N. W. 385.

**Jackson v. Auditor**, 112 N. W. 1017.

Thus, the omission of the first part of Section 12 of the bill as printed would not operate to defeat the measure or prevent it from becoming efficacious as a law, because it would be the duty of the

Commissioners, if the bill were silent on the subject, to do just the things which it is therein provided they should do.

Sec. 2894, Subs. 2 and 19, Revised Codes.

But the provision of the bill fixing the salary of the County Superintendent at Nine Hundred Dollars is vital. There is no means of knowing into what class this county may fall when it is classified by the commissioners if it shall assume life, but whatever class it may go into the salary fixed by the bill for this office will differ from the salary provided by the general law for the office of county superintendent of schools.

If it shall be found to come within the eighth class, the salary of the county superintendent as provided by the general law, and that should be held to control, will be \$600.00; if within the seventh class, \$800.00; in the sixth class, \$1200, and in any of the higher classes a still greater sum.

Section 3116, Revised Codes.

Accordingly, if the county to be created should be found to belong to the eighth or the seventh class, it is evident the legislature intended that this officer should receive a salary greater than that paid the incumbents of the office in older counties of the same class; yea, it was intended that though it should rank only as an eighth class county, the county superintendent should receive a salary greater than that paid to the same officer in old

in old seventh-class counties.

But the provision with which Section 11 concludes is all important.

As stated, there is no means of knowing in what class this county would be found, until a classification is made pursuant to the provisions of Section 2975 of the Revised Codes, in September, 1910. If, at that time, the assessed valuation is more than four and less than six millions, the salaries may be increased so as to conform to the salaries prescribed for officers of the same class by the general law. If the valuation should be found at that time to be less than \$4,000,000, no increase in the salaries occurs, though it is not expressed that they may be decreased. Likewise, if the assessed valuation shall be more than \$6,000,000, no increase can be made. It is only when the assessed valuation is between \$4,000,000 and \$6,000,000 that the increase may be started. Apparently, if at any classification time, the valuation is not found to be somewhere between \$4,000,000 and \$6,000,000, no increase is allowable, and the officers of this county must content themselves with a less salary than that received by the same officers in other counties of the same class. Just what salaries would be paid to the officers of this county if the assessed valuation should be found, when the classification is made, to be between \$4,000,000 and \$6,000,000, is a matter involved in more or less doubt.

It would be beyond the eighth class, which includes all counties having an assessed valuation of less than \$3,000,000.

Section 2973, Revised Codes.

If it should be over \$3,000,000 but less than \$4,000,000 it would be in the seventh class, but the officers could have no raise of salaries to conform to those paid in other counties of that class.

There would be a difference to the disadvantage of the treasurer to the amount of \$600 annually; in the case of the sheriff, \$500, and clerk and recorder \$600.

Evidently the legislature did not intend that the salaries of these officers should be regulated and controlled by the general law. It is apparent that it was felt that the burden of the salaries fixed by the general law would be heavier than it ought to impose on the people of this new county.

The omitted portions are, therefore, essential and important parts of the measure.

It is impossible to say that they were not a moving consideration in securing for the bill the approval of the legislature, nor that it would have passed had they not been incorporated in it. It is not an unreasonable supposition that support may have been obtained for the bill essential to its passage by the presence in it of these very provisions. The whole bill, all its provisions, was what evoked the approval of the legislative body. They considered one measure,—the Governor

signed another. Possibly he would not have signed a bill having these provisions in it. It might have appealed to him as unjust that the county superintendent of schools should get a larger salary in this new county than is paid to the same officer in counties of either the seventh or eighth class, or that it was unjust to pay the officers of this county, after classification, less than was paid in other counties of the same class, or that it was unwise to disturb the rule of uniformity in this regard. Anyway he did not sign the measure passed by the legislature.

#### IV.

#### IS SECTION 11 CONSTITUTIONAL?

The only way it can be upheld as a law is by discarding the entire Section 11 as unconstitutional.

Of course, if this section is unconstitutional, the legal effect of the act as signed is the same as the legal effect of the act as passed, and the omission is immaterial. It is just the same as the omission of words from a bill which do not change its meaning.

It might be advanced that the whole section is void because special legislation is forbidden by Section 26 of Article V of the Constitution. There is, however, no provision of that section prohibiting the passage of special laws in relation to the salaries of officers, and if legislation of this character is condemned at all, it must be by virtue of

the concluding clause, "In all other cases where general law can be made applicable, no special law shall be enacted."

Two complete answers may be made to any such contention.

1. Under that provision the legislature is the judge as to whether a general law is or is not applicable.

2. Neither that nor any other part of the section prohibits a special act creating a county and making temporary provision for its government.

The first proposition above asserted is supported by a direct adjudication of the Supreme Court of the United States in

Guthrie v. City, 173 U. S. 528.

The act of July 30, 1886, prohibiting special legislation by the territories, provided, among other things, that no special law should be enacted "where a general law can be made applicable."

The validity of the act of the legislature of the territory of Oklahoma being challenged, as violating this provision, the court said:

"Whether a general law can be made applicable to the subject matter in regard to which a special law is enacted, by a territorial legislature, is a matter which we think rests in the judgment of the legislature. State (Johnson) v. Hitchcock, 1 Kan. 184."

All the courts hold, apparently, that at least a wide latitude is reposed in the legislature to determine whether a general law can be made

applicable. The greater number insist that the discretion vested in the legislature in that regard is not open to review by the courts. A monographic note to the case of

Sanitary Dist. v. Ray, 93 Am. St. 102, holding, in accordance with the weight of authority as above announced, collects many, if not all, of the cases in which the subject was considered. It quotes the following from

People v. Mullender, 132 Cal. 217,  
namely:

“That the act here in question is both local and special is conceded. But that is not conclusive. The language of said paragraph (of the constitution which prohibits local or special laws in all other cases where a general law can be made applicable) plainly implies that there are or may be cases where a local or special act may be wise, salutary, and appropriate, and in no wise promotive of those evils which result from a general and indiscriminate resort to local and special legislation. The constitution submits the question whether a general law can be made applicable in any given case to the judgment of the legislature, to be determined in the light of the evils intended to be avoided, and with its determination upon that question we may not interfere, unless the disregard of the constitutional requirement is clear and palpable.”

The statute is equally safe from successful attack for the second reason above assigned.

This court said in

Halliday v. Sweet Grass Co., 19 Mont. 364:



“Creating a new county by a special act is not forbidden by the state constitution, and matters necessarily incident to the creation of a new county, which are provided for in the act creating it, solely for the purpose of organizing the new county and setting it in motion as one of the governmental subdivisions of the state, do not come within the letter or the spirit of the inhibition of Section 26, Article 5.”

In that case the validity of warrants issued upon the adjustment of the indebtedness of the old county between what remained of its territory and the new county was attacked. It would seem as though a statute, general in its nature, providing for the adjustment of the indebtedness on the division of the property of a county, on the creation of a new county from a part of its territory, could be framed. This decision seems to be an adoption by our court of the rule laid down by the Supreme Court of the United States. But however that may be, it is a direct adjudication that Section 12 is not open to criticism as being in violation of any of the provisions of Section 26 of Article V.

The Sweet Grass case was affirmed in

Sackett v. Thomas, 19 Mont. 364.

The suggestion above made that a general law could be framed providing for the adjustment of financial relations on the creation of a new county finds its answer in the following language from

People v. McFadden, 81 Cal. 489,

in which the doctrine of *Halliday v. Sweet Grass County* was affirmed:

"3. It is also claimed that the act is void because it is in conflict with, or passed in violation of, Art. 4, Sec. 25, Subd. 33 of the Constitution, where it is provided that 'the legislature shall not pass local or special laws \* \* \* in cases where a general law can be made applicable.' This point is not well taken. While it may be found practicable, and the legislature has already endeavored, by a single act, to provide a uniform system of county government, we can hardly conceive it possible, in view of the varied conditions of the different localities in this state, if, indeed, it could be done in any state, to frame a single law which should meet the necessities of each attempt to organize a new 'political subdivision of the state.' In any event, whether such a law could 'be made applicable' depends upon questions of fact which this court has no means of investigating, and upon the solution of which it would not attempt to substitute its judgment in place of that of the legislature. The policy of adding to the number of the 'political subdivisions of the state' is one to be determined by the legislative department of the government, in each instance when the proposition to do so is made; and, if the determination be favorable, then the legislative department alone must fix and determine the boundaries of such subdivision."

The doctrine of this case was affirmed in

*People v. Glenn*, 100 Cal. 419,

the court saying:

"There are other points made by appellants

in their brief which we do not deem necessary to be largely discussed. They are in great part answered by the decision of this court in *People v. McFadden*, 81 Cal. 489, 15 Am. St. Rep. 66, which involved the validity of the act creating the county of Orange. It must be remembered that, as held in the case just cited, an act creating and providing for the original organization of a new county is not within the prohibitions of the constitution against special and local legislation; and this consideration parries most of the additional thrusts made in the brief at the validity of the Glenn County act. Many of the provisions of an act creating a new county are intended to be only preliminary and temporary, and are necessary to put the new political subdivision on its feet, so that at the expiration of time limited for the existence of the temporary expedients, the county may, in due course, take its place under the general law for the government of organized counties."

Indeed statutes have been upheld fixing the fees and compensation of particular officers of a single organized county, presumably upon the theory that what would be adequate compensation in one county of a particular class would not be adequate in another of the same class, and that the action of the legislature indicates that a general law could not be made applicable,—that is to say, that in its judgment a general law would work inequitably and unjustly and would, therefore, be inapplicable. Such a decision was made in the case of

State ex rel McNamee v. Spinner, 37 Pac.  
837.

The point ruled on is disclosed in the following quotation from the opinion:

“At the session of the legislature in the year 1891, an act was passed allowing a justice of the peace of Eureka township a salary of \$60 a month, in lieu of fees. St. 1891, p. 35. The only question is whether the legislature had the power to adopt a special law applicable to the incumbent of this office. The objection is that the law is special and local, regulating county and township business, contrary to the provisions of Section 20 of Article 4 of the Constitution. The authority to enact special laws fixing the compensation of county officers has been frequently exercised by the legislature. No judicial question as to the constitutionality of such legislation had been made until the case of State v. Fogus, 19 Nev. 247, 9 Pac. 123, was decided. In that case the power of the legislature to adopt laws of this nature was upheld. That decision was followed and approved in the case of Mining Co. v. Allen, 21 Nev. 325, 31 Pac. 434.”

The propriety of this decision and others referred to in the opinion appealed so strongly to the people of Nevada that when their constitution was amended they provided that the inhibition of special legislation should not extend to “deny or restrict the power of the legislature to establish and regulate the compensation and fees of county and township officers.”

A like conclusion was reached in the case of

Campbell v. Board, 65 Pac. 679.

In that case a statute fixing the compensation of the probate judge of Labette County was attacked as being special legislation, in violation of the constitution. With reference to this claim the court said:

“As to the latter contention, it has been expressly decided by this court that the legislature has the power, by special law, to prescribe the fees that may be retained or salary to be paid to the county officers in the different counties of the state (*Com'rs. v. Shoemaker*, 27 Kan. 77), and that in such matters of local concern it is the province of the legislature to determine and declare whether the object to be attained can or cannot be accomplished by the passage of a general law. (*State v. Hitchcock*, 1 Kan. 178, 81 Am. Dec. 503; *Elevator Co. v. Stewart*, 50 Kan. 578, 32 Pac. 53; *State v. Llewelling*, 51 Kan. 562, 33 Pac. 425; *Eichholtz v. Martin*, 53 Kan. 486, 36 Pac. 1064.)”

But whether the legislature could or could not enact a statute fixing the fees or compensation of a particular officer of one county or the officers of any particular county previously organized, and in operation, it is scarcely open to doubt that it can make temporary provision in relation to the officers of a county in the act creating it.

This is not the first instance in which the legislature has made special provision in relation to the salaries of the officers of a new county in the act creating it.

The Sanders County act made similar provision.

Laws of 1905, page 18,  
though that creating Broadwater made the general  
law applicable,

Laws of 1887, page 45,  
as did the act bringing Rosebud into being.

Laws of 1901, page 97.

By operation of the general law these counties  
became at once of the seventh class, for the pur-  
pose of determining the salaries of their officers.

Political Code, Section 4332.

(This section seems to have been omitted in the  
late revision.)

It is evident that the legislature intended that  
the officers of this new county should not have the  
salaries to which they would become entitled under  
the general law. It intended to effect a saving  
to the people, as shown above, of \$600 annually in  
the case of the treasurer, \$500 in the case of the  
sheriff, and \$600 in the case of the clerk and recor-  
der, but felt, apparently, perhaps because of the  
extent of territory and sparseness of the popula-  
tion, involving the necessity of much travel and  
into perhaps remote regions, that the county su-  
perintendent should have \$100 more than she could  
claim under the general law.

## V.

**CAN THE COURT LOOK TO THE BILLS ON  
FILE WITH THE SECRETARY OF STATE?**

The contention is made, however, that the court

can not look beyond the enrolled bill to ascertain whether it does conform to the bill which passed both houses; that there is a conclusive presumption because it bears the signatures of the presiding officers of both houses and of the Governor that it is the identical bill which passed, or, if the court can look farther than the enrolled bill (which, of course, is saying that no determination can be made by any court of the invalidity of a law for lack of conformity between the bill which passed and the enrolled bill), it is impossible or improper for the court to consult anything in arriving at a solution of the question but the journals of the two houses.

Presented in its broadest aspect, namely, that there is a conclusive presumption that the very bill which is enrolled was passed by the two houses, the contention was rejected by this court in

**Palatine Ins. Co. v. N. P. Ry. Co., 34 Mont.  
268.**

The doctrine of this case was re-affirmed in

**Johnson v. Great Falls, 99 Pac. 1059.**

The question, so much debated in other jurisdictions, and in respect to which the courts are hopelessly divided, must here be considered as now at rest.

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presented, of the effect of a substantial variance between the bill which passed the assembly and the bill which was signed by the Governor. Thus in

Brady v. West, 50 Miss. 68,  
it was held that when it appeared that the enrolled bill differed in an essential particular from the bill that passed, there was no legal enactment, but when the question came before the same court again in

Ex parte Wren, 63 Miss. 512,  
the court laid down the rule that the enrolled bill is conclusive, and held that the variance, if any, was immaterial, or rather that the court without looking into the question would say there was no variance.

In this aspect the question is not open to consideration before this court, but it is not important to inquire as to what sources of information are available to the court in its inquiry as to the validity of the bill.

The relators assert that the inquiry which they invite is imposed upon the court as a logical necessity from the rule laid down in the Palatine Insurance case. That case holds, as stated, that it is the duty of the court to ascertain, by an examination of the legislative journals, whether the bill claimed to be a law received the votes of a majority of each house, and whether the ayes and noes on the measure are recorded in the journals.

Wanting in sanction in either of these respects, it is not a law. That obligation involves the duty of determining the identity of the bill claimed to have been passed, with the one which actually did pass. The following language from the opinion in the case of

State ex rel Attorney General v. Platt, 16  
Am. Rep. 647-652,

is particularly pertinent here:

“Looking carefully into the essential character of the judicial act cast upon this court, it is evident that, allowing the great seal, or the signatures of the presiding officers of the respective houses, to stand as unimpeachable evidence of the *identity* of the act, as enrolled, with that acted upon by the houses, would be equally inconsistent with the object and intent of the constitution, as in the case just supposed. In order to determine whether an act has passed through all the requisite stages of legislative progress, *its identity, in each of those stages*, must be determined. If the formalities of enrollment do not prevent us from looking into the journals, in order to see that the bill had its proper readings, of what value will that be to us, if we are estopped by the enrollment from inquiry as to what bill the journals have relation? To give full force and effect to the constitution, if an issue of *identity* is raised, we must look into the bill or act, at each step of its progress, to determine that that which has received part of the formalities requisite to its validity as law is the same with that which has received the residue of such formalities.”

The relators assert that this particular enrolled bill never received a majority vote in either house, nor was any record made of the ayes and noes on it. The vote recorded, it is claimed, was on another, essentially different bill. Can the court inquire whether the bill that passed is different, and how can it inform itself?

The multitude of cases in which bills have been held never to have become laws, by reason of a variance between the engrossed or original bill and the enrolled bill, demonstrates that the courts, where the enrolled bill is not deemed conclusive, do enter upon the inquiry. It is asserted, however, that the inquiry must be confined to the legislative journals, and general statements to that effect are met with, not infrequently, in the reports, rarely, however, as will be shown hereafter, upon a direct question as to the right of the court to make use of the official sources of information on which it is insisted, by the relators, it should lay hold in this case.

It is conceded, with the most perfect freedom, that parol testimony can not be received to show such a variance, and for perfectly obvious reasons. It is a fundamental rule that the court knows, judicially, the law. If oral testimony could be taken for and against identity, the question as to whether there is or is not a law would depend on how an issue of fact would be resolved by the court. Perforce the court must know the law,

by reason of its knowledge of facts of which it takes judicial notice. And it would seem that if facts of which it takes judicial notice say there is no such law, the court could scarcely refuse to pronounce judgment accordingly.

This is the significance, it may reasonably be assumed, of the following language of the opinion in the Palatine Insurance Company case:

“The provision of the constitution to which we refer, in our opinion, would be absurd and useless if evidence may not be taken to determine whether the will of the people as expressed in the constitution has been obeyed by their servants, the legislators.”

In the case of

Lankford v. Somerset Co., 11 L. R. A. 491-497,

a question arose as to the date when a certain bill was presented to the governor, and it was held that the official records in the office of the Secretary of State could be referred to, notwithstanding the certificate on the bill, and the court said, as relevant to the proposition last above considered:

“We do not decide this question as an issue of fact on evidence adduced by the parties, or on admissions made by them, but on our constitutional responsibility to take judicial notice of the Statute, and of all matters which affect its validity. To enable us to sustain this responsibility, *it is our duty to avail ourselves of all trustworthy information within our reach.*”

The views thus expressed were supported by a quotation from

Gardner v. Collector, 6 Wall, 499,  
hereafter to be referred to.

The relators insist that the court must and does take judicial notice of the original and engrossed bills on file in the office of the Secretary of State, and that it knows by a comparison of them with the enrolled bill that the portion claimed to have been omitted from the enrolled bill was, in fact, omitted.

These records are on file with the enrolled act itself, by virtue of positive law. The Secretary of State is required to keep in his custody "all books, records, deeds, parchments, maps and papers kept or deposited in his office, pursuant to law."

Section 153, Revised Codes.

Section 76 of the Revised Codes provides:

"Duties at Close of Session.—The secretary of the Senate and clerk of the House of Representatives at the close of each session of the Legislative Assembly must mark, label and arrange all bills and papers belonging to the archives of their respective houses, and deliver them, together with all the books of both houses, to the Secretary of State, who must certify to the reception of the same."

The secretary of each house is made the custodian of all bills coming before it.

Section 69, Revised Codes.

State v. Bloor, 20 Mont. 574.

Unless these sources of information can be looked to for the purpose of ascertaining whether any paper in the office of the Secretary of State, which appears to be a law, is, in fact, such, why should they be so carefully preserved? Can any one conceive why they should be permitted to lumber the archives of the state except they may be used to determine whether an enrolled bill is indeed the expression of the will of the people of the state?

The very highest authority sanctions their use for that purpose. Before referring to the direct adjudications and text writers speaking on this subject, some pertinent decisions of the Supreme Court of the United States should be adverted to.

The question as to whether there is or is not a law creating Lincoln County is one of which the court takes judicial notice, and the question is presented as to what sources it may resort to in forming itself judicially. In

Gardner v. Collector, 6 Wall. 499,  
the highest court in the land said:

“We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the *existence* of a statute, or of the *time* when a statute took effect, or of the precise *terms* of a statute, the judges who are called upon to decide it have a right to resort to *any source of information which in its nature is capable of conveying*

*to the judicial mind a clear and satisfactory answer to such question."*

The doctrine of this case has frequently been reasserted. Approving it in

Jones v. United States, 137 U. S. 202,  
it was said that:

"In the ascertainment of any facts of which they are bound to take judicial notice, as in the decision of matters of law which it is their office to know, the judges may refresh their memory and inform their conscience from such sources as they deem most trustworthy. *Gresly, Eq. Ev. pt. 3, chap. 1; Fremont v. United States, 58 U. S. 17; How. 542, 577 (15:241, 245); Brown v. Piper, 91 I. S. 37, 42, (23:200, 202); State v. Wagner, 61 Me. 178. Upon the question of the existence of a public statute, or of the date when it took effect, they may consult the original roll or other official records. Spring v. Eve, 2 Mod. 240; 1 Hale's Hist. Com. Law (5th ed.) 19-21; Gardner v. Collector, 73 U. S. 6 Wall. 499 (18:890); South Ottawa v. Perkins, 94 U. S. 260, 267-269, 277 (24:154, 157, 158, 161); Post v. Supervisors, 105 U. S. 667 (26:1204.)"*

And again in the case of

Lyons v. Woods, 163 U. S. 649,  
decided after Field v. Clark, which this court refused to follow in the Palatine Insurance Company case, the language of Gardner v. Collector, above presented, was quoted with approval.

Upon the authority of Gardner v. Collector, the Supreme Court of Louisiana ruled squarely upon



the proposition here presented, namely, the propriety of the court's examining the engrossed bill on file pursuant to law in the office of the Secretary of State, to determine the conformity to it of the enrolled bill. In that case the party attacking the validity of the enactment introduced certain entries in the journal, after speaking of which the opinion continued:

"To the foregoing testimony no objection was urged, both parties conceding its admissibility, taken in connection, as it is, with the published statutes of the legislature; but when the defendant's counsel offered in evidence 'the original engrossed House Bill No. 257, with all indorsements thereon, including the original Senate amendments attached thereto,' plaintiffs' counsel objected on the ground that same was inadmissible because, 'the journals of the House are the best and exclusive evidence of the proceedings of said House, and (that) no other, of any kind, is admissible' for that purpose. The court ruled to receive it in evidence, and properly, in our opinion."

And then, after referring to *Gardner v. Collector*, added:

"We had occasion to express a similar opinion upon a somewhat similar question in *State v. Secretary of State*, 43 La. Ann. 613, to-wit: 'Nor can we see the impropriety of the judge admitting the papers that were offered by the respondent. They were at least of a *quasi* official character, and will, evidently, aid us in determining the true character and value of the published volumes,

which purport to be official journals.'

"On reason and authority we regard the engrossed house bill as a proper subject for consideration, in connection with the journals kept of legislative proceedings. It is the *res*, the very subject matter then under legislative consideration. It proves *res ipsam*, if it proves nothing more."

Upon the authority of this and other decisions of like tenor, the Encyclopedia of English and American Law gives the rule in the following language:

"In some states it has been held that the engrossed bill, not being a record, cannot be introduced in evidence to impeach the enrolled bill or the legislative journal, but in other states the original engrossed bill has been admitted. In Arkansas, where the engrossed bill is filed according to law in the office of the Secretary of State, it has been held admissible."

26 Ency. of E. & A. Law, 559.

On the very question now before the court, namely, whether the bills on file in the office of the Secretary of State, coming to him under the sanction of the law from the two houses themselves, to be by him carefully preserved for use, are properly resorted to, the Supreme Court of Wisconsin, in a case decided as late as 1901,

Milwaukee County v. Isenring, 85 N. W.  
131-137,

said:

"The scope of the rule that courts take

judicial notice of the journals of the two houses of the legislature, and the effect of such journals as evidence, are misapprehended by respondent's counsel. While such journals are controlling as regards what the legislature does in respect to the passage of a bill (*People v. Starne*, 35 Ill. 121), they are not necessarily so as to the contents of a statute. On the latter subject *courts may look to the enrolled bill, to the engrossed bill, and to any other legitimate evidence within their reach*. *Evans v. Browne*, 30 Ind. 514; *Sherman v. Story*, 30 Cal. 253; *Board v. Heenan*, 2 Minn. 330 (Gil 281); *Fouke v. Fleming*, 13 Md. 292; *Gardner v. Collector*, 6 Wall, 499. 18 L. Ed. 890; *In re Duncan*, 139 U. S. 449, 456, 11 Sup. Ct. 573, 35 L. Ed. 219; *James v. U. S.*, 137 U. S. 202, 216, 11 Sup. Ct. 80, 34 L. Ed. 691; *Lyons v. Woods*, 153 U. S. 649, 14 Sup. Ct. 959, 38 L. Ed. 854."

In the case of

*Supervisors v. Heenan*, 2 Minn. 330,

mentioned in the opinion above referred to (Gil. 281),  
Mr. Justice Flandrau, a jurist of extraordinary  
genius and power of mind, said:

"The court may inspect the original bills on file with the Secretary of State, and have recourse to the journals of the houses of the legislature to ascertain whether the law has received all the constitutional sanctions to its validity."

In the case of

*Chicot Co. v. Davies*, 40 Ark. 200-212,

referred to in the note to the text above quoted  
from the *Encyclopedia of Law*, the court said:

“But at all events, it is urged that we cannot go behind the journals for the purpose of examining the draft of the bill. In *Loften v. Watson*, 32 Ark. 414, and in *Haney v. State*, 34 Ark. 263, this court did examine the original bills introduced into the legislature. The enrollment is a solemn record, and the existence of the act is to be tried by the record, and is not to depend upon the uncertainty of parol proof, or upon anything extrinsic to the law and the authenticated recorded proceedings in passing it. But the enrolled act is not the only record in the case. The inquiry may be carried back to the legislative journals and the records and files in the office of the Secretary of State. In the *Matter of Wellman*, 20 Vt. 656.”

The court then cites the statute of that state requiring the records, papers, books and rolls of the General Assembly, on its adjournment, to be filed with the Secretary of State, a provision of law substantially like the provisions of our code referred to above.

These bills are *records* of the legislature, speaking as plainly and as intelligibly of its action as do the journals. Indeed they *must* be consulted to make the journal intelligible. When the journal declares that a certain bill passed and shows the result of the call of ayes and noes upon it, it does not refer to the enrolled bill. It cannot. The enrolled bill had not yet come into existence. The journal entry is meaningless unless it be interpreted in the light of the bill that was before the

house at the time the vote was taken. The original bill is no less a legislative record than is the entry on the journal.

In the indictment on which a conviction was had in *State v. Bloor*, *supra*, the defendant was charged with having secreted "a certain record, bill or paper of the Fifth Legislative Assembly."

Prominent among the cases above first referred to, holding that a material variance between the bill which received the approval of the legislative body and the enrolled bill signed by the Governor is fatal to the law, are a number from the state of Alabama.

In that state it is settled that in order to determine the identity or want of identity in the two, the court looks to the legislative *records*,

*Jones v. Hutchinson*, 43 Ala. 721,

although other cases in the same state hold that whether amendments were adopted can be shown only by the journals.

In

*State v. Moore*, 55 N. W. 299,

the Supreme Court of Nebraska, considering the case of a difference between an enrolled and an engrossed bill, said:

"It is now settled that this court will look into the *records and journals* of the two houses of the legislature to ascertain if they have complied with the constitutional provisions of the state with reference to the enactments of a law."

Sedgwick says, in the text, that the engrossed bills may be looked to for the purpose of resolving the question as to whether the enrolled bill passed,

Sedgwick on Stat. Const., 54-55,  
and, in a note, that the original bill on file in the office of the Secretary of State, may likewise.

The foregoing amply justify the belief that the court is tied down by no rule of law that will compel it to make a state, or the people of a state, abide by laws they never adopted, by which it is forced to shut its eyes to information from official sources, preserved by the law for no obvious purpose if not for the enlightenment of the court, as to the measures which did or did not receive legislative sanction.

The only authority of which, as it is now recalled, mention was made at the oral argument, as declaring that the original bill could not be referred to, was Sutherland on Statutory Construction. The language of the author is:

“Nor is the original bill with its endorsements admissible for the purpose of impeaching the enrolled act *or* contradicting the journal.”

The declaration is made in the course of an extended discussion, or immediately following a discussion of the subject considered by this court in the Palatine Insurance Company case, in which

the author takes a very decided stand against the view adopted in that case. How deeply he is affected with the partisan spirit is disclosed by the fact that he gives the reader, in connection with the statement above quoted, no intimation that any court ever held otherwise, nor does he proffer any clue to any of the cases above cited, holding against the doctrine of the text. He supports it, however, by reference to two cases from Nebraska and one from an inferior court of the State of Ohio.

State v. Abbott, 80 N. W. 499.

In re Grainger, 76 N. W. 558; and

Walbridge v. Jones, 22 Oh. C. C. 682.

Such unfairness in the text leads us to doubt the accuracy of the citations. Of course, the proposition that the original bill is not admissible to 'contradict the journals' is one not here involved. It may be admitted, as the statement is undoubtedly correct. That was what was decided in

In re Grainger,

and all that was decided.

In the opinion in this case, however, is a reference to the case of

Division of Howard Co., 15 Kan. 194,

also relied upon at the oral argument by the respondents as altogether conclusive in the inquiry before the court, from which it appears that there was no law in Kansas making the engrossed bills

public records. We quote:

“The engrossed bill as it passed the House is also on file in the office of the Secretary of State, but it is not signed by any person, and there is no record evidence of any kind whatever tending to show that it is in fact such engrossed bill. \* \* \* The journals of the two houses are entirely silent upon the matter, and the said engrossed bill, as we shall presently see, is not a record, nor a part of any record. \* \* \* It will be noticed that the legislative journals and the enrolled bills are the only records required by law to be kept for the purpose of showing any of the legislative proceedings. There is no provision for preserving the engrossed bill as a record of the legislative proceedings; and as the legislative journals and the enrolled bills are by law records, and the only records, of legislative proceedings, they must, of course, import absolute verity, and be conclusive proof as to whether any particular bill has passed the legislature, when it passed, how it passed, and whether it is valid or not. \* \* \* Now, as we have before intimated, the enrolled bills and the legislative journals being records provided for by the constitution, importing absolute verity, we cannot take judicial notice that they are untrue; nor can we even allow evidence to be introduced for the purpose of proving that they are not true. Therefore, as the enrolled bill of the law dividing Howard County, and the journals of the legislature, would seem to prove that said bill has been legally approved by the Governor in the form as it now appears enrolled in the Secretary's office, we cannot take judicial notice that said bill was not properly so



passed and so approved; and we cannot even allow evidence to be introduced showing that it was not so passed and so approved."

In Kansas, as appears by the opinion in 15 Kan. 194, the statute required the filing in the office of the Secretary only of "*enrolled* laws and resolutions," and after providing for the preparation of an index of such, the statute declared that "no other or further record of the official acts of the legislature, so far as it relates to acts and joint resolutions, shall be required of said secretary."

It was in view of the foregoing that the court said, as above quoted, that "there is no provision for preserving the enrolled bill," and that only the enrolled bill is required to be kept to show the legislative proceedings.

But the case is strong in a negative way in support of the position of the relators, because of further comment. It was claimed that a mistake had been made in the engrossed bill, as is the claim here. After referring to the fact that no law required the preservation of the engrossed bill, the court said:

"Such mistake (not being shown by any record) is not allowed to have any such effect upon the validity or meaning of said law; we can neither take judicial notice of the mistake nor can it be proved to us."

Clearly here is a most pointed intimation that if the statute made the engrossed bill a public record, it would be judicially noticed, and by rea-

son of such notice any mistake in the enrolled bill would be judicially noticed.

In the Grainger case an effort was made to impeach the recitals of the journal as to the action taken in reference to a bill, by the endorsements on the engrossed copy. This, it was held, could not be done. So much and only so much that case decided.

The value of the text of Sutherland is attested by the fact that in the other Nebraska case, cited in the note in support of it, it is said that "in some cases courts of last resort have approved the reception in evidence of the engrossed bill."

After making this statement, the court refers to the rule that the enrolled bill may be impeached, by the journals, and adds, after referring to *In re Grainger*, as so holding, "In the case last cited, the consideration of other evidence than the enrolled bill and the journals was *in effect* disapproved."

Now in that case certain slips or memoranda were attached or pinned to the original bill, some of them containing endorsements to the effect that they were "Carried," or "Adopted," others being unmarked. Of these the court said:

"They were in no manner identified except by their subject-matter, respectively, and the fact that they were in the office of the Secretary of State, and placed there by an officer of one house of the legislature; and probably that they were so delivered, occurred

because they were pinned to the original bill. There was nothing more to show that they ever became or were of the proceedings of the legislature."

Finally the court concludes that "the engrossed bill is not such matter of care and record in the proceedings that it should be received to impeach the statements of the properly authenticated records of the acts of the legislature," citing *In re Grainger and Division of Howard County*.

It is enough to say, with reference to the Ohio case, that the documents there considered by an intermediate court, did not come from the office of the Secretary of State, and there was no statute under which they were preserved.

The clear weight of authority and of reason supports the contention of the relators that the court has access to and must notice the original and the engrossed bills on file in the office of the Secretary of State, and declare that the enrolled bill, purporting to create Lincoln County, never receive a majority of the votes of either house.

The question before the court is however, as it would seem, governed by other provisions of the codes, if those already referred to are not sufficiently definite.

It will be observed from the quotations made above, as well as by the whole course of the dis-

cussion on the subject, that the contention of the respondents is that the enrolled bill is conclusively presumed to speak the truth; that when the journal says that Senate Bill No. .... passed there is a conclusive presumption that the bill which passed was identical with the enrolled bill. But there is no such conclusive presumption under our law.

Section 7961 of the Revised Codes reads as follows:

“Specification of conclusive presumptions.—  
The following presumptions, *and no others*, are deemed conclusive:

1. A malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another.

2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration.

3. Whenever a party has, by his own declaration, act or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or omission, be permitted to falsify it.

4. A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation.

5. The issue of a wife cohabitating with her husband, who is not impotent, is indisputably presumed to be legitimate.

6. The judgment or order of a court, when

declared by this Code to be conclusive; but such judgment or order must be alleged in the pleadings, if there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used as evidence.

7. Any other presumption which, by statute, is expressly made conclusive."

Section 7962 of the Revised Codes provides that:

"All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence."

There is a presumption that the enrolled bill conforms to the bill as it passed both houses, but by the express provisions of the sections of our law above quoted that presumption is a rebuttable one. It may be overcome. But how can it be overcome? In the case of a bill that was not amended in the course of its passage, it is impossible to show by any evidence but the original bill that the enrolled bill differs from it. In every case of a bill not amended in its passage, there would, then, be a conclusive presumption that the enrolled bill conforms to the bill that passed, which is contrary to the express declaration of the statute. In most cases the same condition would exist even if amendments were made, the journal most frequently, perhaps, not setting out the amendments.

Of course the discussion of the question as to whether the original or the engrossed bill may be

consulted is of importance only as the omission of a part of the bill, as printed,—appearing in the original and in the engrossed bill—becomes a vital one to the cause of the relators.

If the position of the relators with reference to the amendment originating with the Senate Committee on Counties, Towns and Municipal Corporations is correct, it will not be necessary for the court to enter upon an inquiry as to the admissibility of the records in the office of the Secretary. As to the amendments the journal speaks. It tells just what was done with them. The journal and the enrolled bill tell whether those amendments were adopted or were not adopted, and the court must find, if the argument first above made is sound, that they were not adopted and did not become part of the bill. The contention of the respondents is that though the journal speaks as to the action that *was* taken in reference to these amendments, the court is bound to presume, because they are in the enrolled bill, that there was some other action in relation to them concerning which the journal is silent. To support this

McKenna v. Cotner, 49 Pac. 956,  
is cited.

It holds that the presumption that attends the enrolled bill is so strong that though the journals should show that a proposed amendment to a bill was defeated, yet if it appears in the enrolled bill.

the court must presume that it was again offered and adopted, or that the former vote was reconsidered and that the earlier vote was reconsidered, though the journal does not show it.

The result of that doctrine is apparent. A bill that is not amended in its passage never appears in any of its provisions in the journal. If the Governor signs what purports to be an enrolled copy of such a bill, there is only one way of establishing that it differs from the original bill—namely, by comparison with it.

If it is amended in its passage by adding to or striking words from it, and the omitted or added words appear, notwithstanding, in the enrolled bill, the court is bound to presume that the recorded action was rescinded. The result is that it never can be shown, under any circumstances, that the enrolled bill is different from the bill that passed. Yet even Sutherland declares that in such case there is no valid enactment.

#### 1 Sutherland on Stat. Const. 52.

It would be interesting to learn from this author how the variance would be shown. There is a plain and simple rule applicable to judicial records properly applied here,—namely, that when the record is silent, presumptions may be indulged to sustain a judgment, but if the record speaks, it is presumed to speak the whole truth, to tell all that was done and no presumption can be indulged that more was done than the record shows.

The principle was applied in

Settlemier v. Sullivan, 97 U. S. 444,  
and the rule expressed in the following language:

“If the record is silent with respect to any fact which must have been established before the court could have rightly acted, it will be presumed that such fact was properly brought to its knowledge. But if the record give the evidence or make an averment with respect to a jurisdictional fact, it will be taken to speak the truth and the whole truth, in that regard; and no presumption will be allowed that other and different evidence was produced, or that the fact was otherwise than as averred. ‘If, for example,’ to give an illustration from the case of Galpin v. Page, 18 Wall. 366 (85 U. S. XXI, 962), ‘it appears from the return of the officer or the proof of service contained in the record that the summons was served at a particular place, and there is no averment of any other service. it will not be presumed that service was also made at another and different place; or if it appear in like manner that the service was made upon a person other than the defendant, it will not be presumed, in the silence of the record, that it was made upon the defendant also.’ ”

To the same effect is

Adams v. Cowles, 6 Am. St. Rep. 74; and  
Hobby v. Burch, 20 Am. St. Rep. 301.

The record speaking of the action of the house with reference to the amendments, showing what action was taken, the court can indulge in no presumption that some action other than that which



the journal shows was taken. The adoption of any other view must lead to the conclusion reached in the Oregon case that, though it show that the bill or an amendment to the bill was defeated, yet if the enrolled bill is on file or the amendment incorporated in it, the presumption must be indulged that the action recorded was reconsidered and rescinded by some action not entered on the journal.

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It was suggested by a question addressed to the writer at the argument by the counsel for the respondents, that the evidence afforded by the original and engrossed bills would not overcome the presumption arising from the enrolled bill, even though the court should consult them. But the enrolled bill shows its own death wound. It is perfectly obvious from the reading of the act as it is printed that there has been some omission in the enrollment of the bill.

See Laws of Montana, 11th Sess. 198.

The several copies of the act prepared in its passage all agree and all differ from the enrolled bill. There is no opportunity for mistake.

It is advanced, however, that all the other bills may be forgeries. If such a contention were made, it is asked would parol proof be taken? The question is not a difficult one. We are always at the peril of the forger. An enrolled bill may be forged

as well as an engrossed bill. The private secretary to the Governor may fabricate his signature and place it on file with the Secretary. Must we obey it? Must this court enforce it? The court is bound to institute some kind of an inquiry. It knows judicially the Governor's signature. But is it going to rely on its own skill to detect a clever forgery or will it call to its aid such expert testimony as it can command, and aid its investigation by evidence of relevant circumstances. Will it decline to hear the Governor say that much as the signature may be like his, he did not sign it? A page may be spuriously interpolated in the journal of either house. All these things are matters necessitating the taking of parol evidence to aid the court in determining the question of forgery. The difficulty is as great about determining the genuineness of the enrolled bill as it is of the engrossed copy or the original of both.

The court, as we think, judicially knows that the bill on file in the office of the Secretary of State purporting to create Lincoln County never passed the Legislature, and it should be so declared.

Respectfully submitted,

WALSH & NOLAN,

Attorneys for Relator.

176 Fed. 211-

# United States Circuit Court of Appeals

FOR THE  
NINTH CIRCUIT.

THE MONTANA COAL & COKE COMPANY,  
(A Corporation),

Plaintiff in Error,

vs.

ANDREW KOVEC,

Defendant in Error.

## BRIEF FOR PLAINTIFF IN ERROR.

This is a writ of error sued out by the Montana Coal & Coke Company to review a judgment for \$5000 and costs recovered against it in the District Court of the United States, Ninth Circuit, District of Montana, in an action brought by Andrew Kovec to recover damages for injuries received while working in the coal mine of plaintiff in error, resulting in the loss of his right hand at the wrist. The negligent acts are set forth in the Complaint as follows: (Trans. p. 2.)

### II.

That prior to the 23d day of September, 1907, the plaintiff was in the employ of the defendant, Montana Coal & Coke Company, as a common miner in the mines of said company at Aldridge, Montana; that likewise the defendant Louis Testovarsnick, was at said time employed by the defendant, Montana Coal & Coke Com-

pany, as foreman or shift boss, and that he had charge of and supervision over certain of the men employed in said mines by the said defendant, Montana Coal & Coke Company, among which men that the said defendant, Louis Testovarsnick, had supervision over was this plaintiff.

### III.

Plaintiff alleges that on or about the 23d day of September, 1907, and while this plaintiff was employed as aforesaid as a common miner, the defendant instructed and directed this plaintiff to take charge of, and operate a certain hoisting electric engine which was used in the operation of said mines by the said defendant, the Montana Coal & Coke Company. That the plaintiff expressed a doubt as to his ability to operate said engine, as he was no engineer, and knew absolutely nothing about the mechanism of an engine, and objected to taking charge of said engine, but was assured by the defendants that he was qualified to take charge of this work, and was persuaded by said defendants to proceed to operate the said engine belonging to said company as aforesaid, and did operate said engine up to the time of the accident hereinafter referred to.

### IV.

That the defendants instructed this plaintiff to take charge of said hoisting engine as aforesaid, with full knowledge that the plaintiff was ignorant and had no experience in the operation of such an engine, and was no engineer, and knew that the running of said engine was dangerous and knew that the plaintiff did not know anything about the dangers attending the operation of said engine, and that the said defendants did not in any way instruct the plaintiff how to manage or operate said

engine, and did not advise or warn the plaintiff of the dangers attendant to the operation of such an engine, but merely compelled him to take charge of, and run said engine.

V.

That the said defendants, Montana Coal & Coke Company and Louis Testovarsnick, were negligent in directing and compelling this plaintiff to operate said engine without first having fully instructed him as to the mechanism of said engine, and as to how the same was operated, and that they were negligent in not warning the plaintiff of the dangers to an inexperienced man running such an engine, and that it became and was the duty under the circumstances herein set forth, and in the exercise of due care on the part of said defendants toward the plaintiff to fully instruct the plaintiff as to how the said engine was managed, and should have warned the plaintiff as to the dangers attendant to the handling and operation of such an engine, but that the said defendants utterly disregarding their duty toward the plaintiff, failed to instruct the plaintiff as to how the said engine was run and failed to warn the plaintiff against the dangers of running such an engine.

VI.

That while the plaintiff was employed as aforesaid and while this plaintiff was operating said hoisting engine as aforesaid, and in the course of his duties, on the said 23d day of September, 1907, he was ordered to stop and shut off the power of said hoisting engine and while the plaintiff was attempting to stop said engine he was obliged to place his foot on the brake of said engine, and that when attempting to so place his foot on the brake, the brake began to vibrate very violently, and

by reason of such vibration of said brake, this plaintiff, in so attempting to place his foot on said brake, was thrown against and into the gearing portion of said engine, and by means of such fall, plaintiff's right hand was caught in the gearing portion of said engine and was taken off at the wrist, and that this plaintiff suffered other physical injuries.

#### VII.

Plaintiff further alleges that there were no guards or any protection whatever surrounding the gearing portion of said engine, and that the said gearing portion was left exposed by reason thereof. That the defendant, Montana Coal & Coke Company, in the exercise of due care and diligence could have known, and in fact did know that there were no guards or protection whatever surrounding the gearing portion of said engine, and that the same was exposed as aforesaid, and that it was the duty of the said defendant, Montana Coal & Coke Company, in the exercise of due care and diligence on its part towards its employees, to have the gearing portion of said engine protected by means of guards or otherwise, in order that accidents of this character would be avoided, but that the said defendant, Montana Coal & Coke Company, utterly disregarding its duty in respect to having said gearing portion of said engine protected as aforesaid, left the said gearing portion fully exposed and unprotected.

#### VIII.

That by reason of the negligence of the defendants in ordering and compelling this plaintiff to operate said engine with full knowledge that the plaintiff was not conversant with the mechanism and handling and the operation of said hoisting engine, and knowing the dangers attend-

ant to the operation of an engine by an inexperienced man, and not having advised the plaintiff as to the dangers incident to the operation of said engine, and not having instructed the plaintiff how to operate, manage and control the said engine, and by reason of the negligence of the defendant, Montana Coal & Coke Company, in not having the gearing portion of said engine properly guarded and protected and by reason of its having left the gearing portion of said engine unguarded and unprotected, this plaintiff had his right hand taken off at the wrist, and suffered severe pain, and other physical damage, and has since, and is now, and will always remain unable to do any physical labor. That the plaintiff was of the age of twenty-nine years and capable of earning One Hundred Ten Dollars (\$110.00) per month, and did earn on an average of One Hundred and Ten Dollars (\$110.00) per month, but that by reason of said injuries, plaintiff's earning capacity has been permanently and almost totally disabled. That by reason of the premises, the plaintiff has been damaged in the sum of Thirty Thousand Dollars (\$30,000).

The answer consisted of a general denial and special defenses of assumption of risk and contributory negligence. (Trans. p. 19.)

The plaintiff by his replication denied generally the allegations of contributory negligence and as to the defense of assumption of risk denied that he was familiar with the use of the machine causing the injury or that he had been advised as to its working. (Trans. p. 23.)

A demurrer on the part of Louis Testovarsnick was sustained and the action dismissed as to him.

This case was tried to a jury, and at the close of the testimony on behalf of the plaintiff, the defendant moved

for a non-suit upon the following grounds: (Trans. p. 147.)

“The defendant now moves the Court for a non-suit on the ground that the plaintiff has failed to establish the case, as pleaded, and has failed to establish any ground of liability on the part of the defendant in this, (1) that the evidence fails to show that the plaintiff was required to operate the engine at the time he testifies he operated it, and (2) that if it could be held that he was required to operate the engine at that time, the evidence is uncontradicted as to the point that the dangers from the operation of the engine with an exposed cog-wheel were obvious and ordinary, and were such as were assumed by the plaintiff, and that whatever statement was made to him by the foreman would not waive such assumption of responsibility.”

The court denied the motion and the defendant accepted.

And at the close of the entire testimony the defendant moved the court for an instruction to the jury to return a verdict for defendant upon the following grounds: (Trans. p. 249.)

“(A) There is no evidence to show that the plaintiff was required to operate the engine in question at the time he undertook to operate it.

(B) The evidence shows that the danger from operating the engine with an exposed cog-wheel was obvious and ordinary, and such as was apparent to an ordinarily prudent person, for which reason the plaintiff assumed the risk incident to such employment.

(C) The evidence shows that the danger from operating the engine with an exposed cog-wheel was obvious and ordinary, and the plaintiff accepted the employment without protest or promise of assistance or instruction.

(D) The evidence shows that the proximate cause of the injury to plaintiff was the negligence of the



plaintiff in the manner of putting his foot upon the brake.

(E) There is no evidence to show that injury to the plaintiff was proximately caused by the failure of the defendant to instruct the plaintiff in the operation of the engine, and the dangers to be guarded against."

The foregoing motion was thereupon denied by the court.

To which ruling of the court the defendant, by its counsel, then and there excepted.

### ASSIGNMENT OF ERRORS.

1. The Court erred in overruling defendant's motion for non-suit made at the close of the testimony in behalf of plaintiff, for the reasons set forth as the grounds of said motion.

2. The Court erred in overruling the defendant's motion to instruct the jury to return a verdict for the defendant made at the close of the entire testimony, for the reasons set forth as the grounds of said motion.

### ARGUMENT.

The assignment of errors raises three questions, which may be thus stated:

1. Was the plaintiff required to operate the engine in question at the time he undertook to operate it?

2. Was the danger from operating the engine with an exposed cog-wheel obvious and ordinary, so as to charge the plaintiff with the assumption of the risk of operating it?

3. Was the proximate cause of the injury the failure of the defendant to instruct the plaintiff in the use of the engine, or was it the negligence of the plaintiff in the manner of attempting to put his foot on the brake.

The plaintiff was twenty-nine years of age, an Austrian by birth, but had been at work in the coal mines of the

defendant company in Montana for over ten years (Trans. p. 34), and in point of service was the senior of any of the miners who testified on the trial. He was employed as an ordinary miner to dig coal, but on the day of the accident was engaged in cleaning out and timbering an air shaft in the mine, at which place he had been working for over a week. (Trans. p. 50.) With him was working another Austrian by the name of Strugel. The place off of which the plaintiff was working was called a slant, and the small cars containing coal or waste was hauled up the slant or incline one at a time by means of a cable and a hoisting engine, operated by electricity. When the cars reached the top of the slant or incline they were thrown onto the main track and taken out by mules to the surface. The hoisting engine was a simple affair similar to that used for hoisting materials upon buildings, the cable or rope winding around the drum. The gearing consisted of two cog-wheels, one large one and one small one, and the machinery was started by pulling down on a lever, which turned on the current. It was stopped by releasing the lever, thus breaking the current, and there was a friction brake, operated by a foot treadle, which would check the motion of the drum. The engine was placed on timbers or cross pieces, and the foot treadle was down between these timbers directly in front of the operator, when standing in position to throw on or disconnect the current. The large gear or cog-wheel was about three feet in diameter and was uncovered, and was right close to the operator on his left hand side and in full view. (Testimony of Nate Drummond, a witness for plaintiff, Trans. p. 88-105.) The machinery was perfectly constructed, but the case was tried upon the theory that it was the duty of the company to have fully advised

the plaintiff of the manner of operating it. (Trans. p. 101.)

The machine was ordinarily operated by an engine man assisted by a rope rider, whose duty it was to attach the rope or cable to the cars down in the slant and ride on the cars up to the switch, and there detach them and run them on to the main track. The engineer took the cars out on the main track by mules and is generally spoken of as a driver. (Trans. pp. 115-119.) The number of men employed in the operation of hoisting depended upon the amount of coal being taken out. At times the engineer did nothing but hoist coal, and two drivers were used to haul the coal out of the main entry. At other times only one driver was used who also ran the engine, and on one of the shifts the miners did their own hoisting. On the day of the accident the rope rider was present with the car; only one driver was on duty, and at the time of the accident he had gone further in on the main entry to get out some cars. (Trans. pp. 136-137.) No one saw the accident. The plaintiff on his direct examination (Trans. pp. 35-46) testifies that on the morning of the accident the foreman told him and his partner to pull up the cars when the driver was absent. That when the driver went inside he (the plaintiff) went up to pull the car up, and started the engine. "I took hold with one hand, kind of that way (illustrating), so that I could work the hoisting engine. . . . I turned that loose when the car got up, and when the car come up, I tried to step on the brake, but the brake was moving so fast I couldn't step on it, and I missed it, and then I fell right in."

"Q. Just explain to the jury what the brake was doing.

A. The brake was shaking, flying around, and I

missed it. I didn't step on it. I missed it.

Q. You didn't get your foot on the brake?

A. No; I missed it and fell right in.

Q. Was the brake going back and forth laterally, as well as up and down?

A. Yes, sir; all ways.

Q. Why did you attempt to put your foot on the brake, Andrew?

A. I tried to stop the rope."

"Q. Could you have taken hold of anything else to stop the engine besides placing your foot upon the brake?

A. No; you can't.

\* \* \* \* \*

Q. Was there any covering over the gearing portion of the engine?

A. No; not before.

Q. Where was the gearing portion of the engine with reference to where the brake was?

A. The brake was under the gearing.

Q. The brake was under the gearing?

A. Yes. You step with the foot on it. It is a kind of a foot brake."

"Q. When you attempted to put your foot upon the brake, you missed it?

A. Yes; and I fell into the gearing.

Q. What portion of your body went into the gearing portion of the engine?

A. The rope rider come up and pulled my hands out. My hands were right in the gearing.

Q. You say your hands. Which hand?

A. The right hand."

\* \* \* \* \*

"Q. Where were you, Andrew, when Testovarsnick, the foreman, told you to pull up the cars, with reference to where the engine was? How far away from the engine were you?

A. I was over thirty feet.

Q. Over thirty feet?

A. Thirty feet, or something like that.

Q. Why did you go to the engine when you went to pull up the cars?

A. I fell in.

Q. No; you don't understand me. I say, why did you go to the engine when you attempted to pull the cars out of the mine?

A. I don't understand you exactly.

Q. How often did you use this engine before, for the purpose of pulling cars out of the mine? Did you ever use the engine before?

A. No.

Q. Then why did you go to the engine when your foreman told you to pull the cars out?

A. Because I am scared of getting fired or something like that. Of course I have got a family. I have to work.

Q. Did you ever operate any kind of an engine like that before?

A. No, sir.

Q. Did you ever use this engine before this particular morning?

A. No, sir.

Q. How long had you used this engine that morning when you went into the gearing portion of it?

A. I was just on the first car.

Q. The first car?

A. Yes.

Q. How long had you been using it before you got injured? How many minutes?

A. About ten or five minutes.

Q. About ten or five minutes?

A. Yes.

Q. How long had Testovarsnick been your foreman before you were injured?

A. About four or something like that, or five.

Q. Four years? About four years?

A. About four.

Q. He had been your foreman then before for about

four years?

A. Yes; I couldn't say exactly when he started. It was about four years, anyway."

"Q. What were you doing during the four years that Testovarsnick was foreman of the mine?

A. Digging coal.

Q. Digging coal?

A. Yes.

Q. What were you doing just before you were ordered to pull up these cars by means of the engine?

A. I was in the air shaft there. I was working there. I was loading coal and rock out there when it caved in there.

Q. How long before the accident happened was it that you were doing this work?

A. I was there working about a week; over a week.

Q. About a week?

A. Yes.

Q. What were you doing the day before you were injured?

A. The day before?

Q. Yes; on the 22d of September what were you doing? What were you doing on that day?

A. I was just working there in that place, loading coal and rock out.

Q. Loading coal and rock out?

A. Yes; and timbering.

Q. What were you loading coal and rock into?

A. Putting it into a car.

Q. What did you do the day before that?

A. The same.

Q. Going back now to the time when the foreman told you to take charge of the engine. Did he tell you how,—what did he tell you that morning? What did he say to you?

A. He just told me to get in and pull the cars up when his driver had no time to pull them.

Q. Did he tell you how to run the engine?

A. No.

Q. Did he say anything else to you at that time? Did he say anything else to you at that time except to tell you to pull the cars up when the driver was not there?

A. No; he didn't tell me anything besides that.

Q. He said nothing else?

A. No.

“Q. Why didn't you tell the foreman, when he told you to take charge of this engine, that you didn't know anything about how to run it?

A. Because I can't tell the foreman anything so as to get to discharge me or something like that. I just got in and worked.

Q. Did you say anything when he told you to do that?

A. I didn't say anything at all. I just went to work.”

We give the witness' cross examination in full which was as follows:

“Q. How long have you been in this country, Mr. Kovec?

A. About eleven or twelve years,—something like that.

Q. Where were you born?

A. I was born in Austria.

Q. At what place?

A. Lieber.

Q. Can you read English?

A. No.

Q. Can you read the Austrian language?

A. Well, a little; yes.

Q. Where did you first work when you came to the United States?

A. I worked there in East Helena for a little while; not very long.

Q. You worked in East Helena?

A. Yes.

Q. How long did you work in East Helena?

A. About half a month.

Q. Then you went up to Aldrich?

14      *The Montana Coal & Coke Company*

A. Yes. Then I went up to Aldrich.

Q. What did you do when you first went up to Aldrich?

A. I was digging coal there.

Q. Had you ever dug any coal before?

A. No.

Q. When did you first get acquainted with Louis Testovarsnick? When did you first know him?

A. I knew him up there.

Q. Where?

A. At Aldrich.

Q. He was there when you first went there?

A. What do you say?

Q. Was he there when you first went to Aldrich?

A. I guess I was there before he was.

Q. You were there before he was?

A. Yes.

Q. You didn't know him in the old country?

A. No.

Q. Did you know Frank Strugel in the old country?

A. No.

Q. When did you first know him?

A. In Aldrich.

Q. How long has he been working there?

A. I can't say how long he has been working there, but it is a long time.

Q. He has been there pretty nearly as long as you have?

A. Well, pretty close.

Q. This coal that you dig out,—what do you do with that? Do you put it in a car?

A. Yes.

Q. Then what becomes of the car? What do you do with the car after you get it loaded with the coal?

A. Just leave it in the switch.

Q. Who takes it out of the mine?

A. The driver. The driver takes it out.

Q. Who was the driver at this time when you were



hurt? Who was the driver then?

A. At that time the driver was Billy England.

Q. Were you mining coal that day you were injured?

A. I was timbering that day when I got hurt.

Q. You were putting in a set of timbers?

A. I was putting in a set of timbers, and fixing it up.

Q. You were really cleaning out an air shaft, were you not?

A. What do you say?

Q. You were cleaning out an air shaft, were you not?

A. Yes; cleaning it and fixing it up.

Q. You were not mining coal that day at all?

A. Not mining coal?

Q. Yes; you were not mining coal that day?

A. I was loading coal in the car from this place.

Q. This stuff that you were putting in the car was waste from the air shaft, was it not?

A. Well, sometimes we put coal in, too.

Q. That is, in your work there in the air shaft, when you found any coal, you put it in?

A. Yes.

Q. But most of the stuff you took out that day was trash out of that shaft, was it not?

A. Yes.

Q. Had you been working in that particular place before that day?

A. I had worked in there before, of course.

Q. How long before.

A. Over a week.

Q. Over a week?

A. Yes; something like that.

Q. Had you been mining in that part of the mine before? Had you been working in that part of the mine before this week?

A. One day before, I think. I don't know.

Q. How did you get in to where you work? How do you get into the mine?

A. I walked in.

Q. You walked in?

A. Yes.

Q. Do you walk by where this engine is?

A. I went in and went to the main entry, and go right in where the air goes.

Q. Had you ever seen this engine before the day you went up there to try to work it?

A. No; I hadn't seen it.

Q. You never had seen it before?

A. No.

Q. You had walked by there, in going to your work in the mine, for a whole week, and didn't see the engine?

A. I seen the engine, but I didn't see it worked.

Q. I didn't ask you that. I asked you if you had ever seen the engine before that day you tried to work it? Had you ever seen the engine before that day?

A. I seen it when I went in.

Q. You saw it as you went by it on your way to your work during this week?

A. Yes.

Q. During this time that you worked in this place, during this week before you got hurt, was the engine running every day?

A. I don't know whether it was running or not.

Q. How did you get the coal out of it wasn't running?

A. I don't know. I just put the cars on the switch.

Q. That is all you had to do with it. You don't know what became of the cars after that? You don't know what became of the cars after you put them on the switch?

A. No.

Q. How far away from where the engine was, was this switch? How far away was this switch from where the engine was?

A. About over thirty feet.

Q. About thirty feet?

A. Over thirty feet.

Q. You had to go by the engine, or you had to walk by the engine in order to get in where you went to work?

A. I went by the engine, and then went around back to the place where I worked.

Q. Did you see anybody working the engine before you undertook to work it that day?

A. I didn't see it that day.

Q. I say before that day. During the week you were working there mining coal, did you see anyone working the engine?

A. Well, England was pulling it up.

Q. When you worked in the other part of the mine, did you ever see any other engines used for hauling up these cars of coal?

A. Well, sure, I seen the engines, but there was somebody running them. I never run any of them.

Q. You never ran any of them?

A. No.

Q. Didn't you run an engine over in what they call No. 4?

A. No.

Q. You never ran an engine at all of any kind?

A. No.

Q. During all the time you were there, you never ran an engine?

A. No.

Q. And never saw one run?

A. No.

Q. Never was around where it was running at all?

A. Not close.

Q. Never any closer to it than this distance of thirty feet, which you say is the distance between the switch and the engine when it is running?

A. No.

Q. How does the engine work? How does it work in pulling up the cars?

A. I don't know exactly how it is worked.

Q. What does it look like? Has it got any wheels or ropes, or anything?

A. Well, it has got wheels and ropes.

Q. Just tell the jury how it looks.

A. I would have to have the interpreter in order to understand it better.

Q. Well, never mind. We will get along without the interpreter, I think. What time in the day was it when you were hurt?

A. About ten o'clock I got hurt.

Q. What time did you go on shift?

A. Seven o'clock in the morning I went on shift.

Q. Who went with you?

A. Frank Strugel.

Q. Was he your partner?

A. Yes.

Q. Was there anybody else working in this slant with you?

A. Not with me.

Q. Was there anyone else in the slant but you and your partner, Strugel?

A. There was someone else in there, but I didn't know who it was,—in that part.

Q. From that time, from seven until ten, was there anyone else there but you and Strugel?

A. No.

Q. Was there anyone else in the mine at all?

A. Yes; in the mine there was.

Q. Whereabouts in the mine were they working?

A. Down below, and back there, when we come in.

Q. What were they doing?

A. They were digging coal, and all that kind of business.

Q. When did Louis tell you that you had to pull the cars up if the driver was not there?

A. He told me that morning.

Q. He told you that morning?

A. Yes, sir.

Q. What time in the morning?

A. Before seven o'clock.

Q. Before you went to work?

A. Yes, sir.

Q. Where was Louis at that time when he told you this?

A. Down by the tool box.

Q. Was Frank Strugel with you when he told you?

A. Yes; he was with me.

Q. Did he tell you to pull them up, or did he tell Strugel to pull them up?

A. He just told us to get in and pull it up.

Q. You didn't say anything to him.

A. No; I didn't say anything to him.

Q. Did Strugel say anything?

A. No.

Q. Could Strugel run the engine?

A. No.

Q. You didn't tell him you could not run the engine?

A. No. I didn't ask him.

Q. You didn't ask him how to run the engine?

A. No.

Q. Or where the engine was?

A. No.

Q. Did you know where it was?

A. Yes.

Q. How did you know that?

A. I knew where the engine was, because I had worked in the back entry there.

Q. You had seen the engine before?

A. Of course, I had seen it.

Q. Did you know how to hook the cars on, so as to pull them up?

A. Sure I knew that.

Q. You had done that often?

A. I put the car on the switch and put the pin on.

Q. You had often done that, had you not? You did that every day? You did that every day, didn't you?

A. Yes; just the car.

Q. How did you get the first car out that morning?

A. That was the first car when I fell in.

Q. That was the first car?

A. Yes, sir.

Q. You were working from seven to ten in getting that one car full?

A. Yes; we were timbering.

Q. You timbered a while?

A. Yes.

Q. Who pushed the car out of the slant?

A. I pushed the car out from the back entry, and my "buddy."

(In using the word "buddy," the witness evidently meant partner.)

Q. Who put it onto the rope? Who hooked the car on to the rope?

A. Jerry Milautz, I guess.

Q. Who was he?

A. He was there.

Q. What was he doing?

A. He was riding the rope.

Q. How do you mean?

A. He just hooked the rope on to the car.

Q. He is the fellow who hooks the car on to the rope?

A. Yes.

Q. Was this rope that you hooked the car on to,—was the other end of that attached to the engine?

A. Yes.

Q. What kind of a rope was it, wire or cotton?

A. Wire.

Q. Who went with you up to where the engine was?

A. I went up.

Q. By yourself?

A. Yes.

Q. Where was Jerry Milautz then?

A. He was right there.

Q. He was standing right near?

A. Yes; down below.

Q. Did you ask him anything about running the engine?

A. No.

Q. Or Strugel, either?

Q. You just went up and started the engine?

A. Yes.

Q. How did you start the engine?

A. I just went up to see anyone get in and see them run that engine, but nobody was there. I never run it before.

Q. When you got up there, you didn't find anyone at the engine?

A. No.

Q. How did you get the engine started?

A. I had seen somebody run it before.

Q. You had seen somebody start it before?

A. Yes.

Q. Whom did you see running it before?

A. I seen Billy England run it before.

Q. It was his business to run it, was it not? That is what he was there for?

A. Of course; but he was not there at that time.

Q. He was not there when you went up to the engine?

A. No.

Q. Had you seen him that morning?

A. No.

Q. Don't you know that he had been hauling coal up all the morning?

A. No.

Q. And had simply gone into the entry with his loaded cars to haul them out of the entry, when you started to run the engine?

A. He had gone inside some place.

Q. What was he doing inside?

A. He had gone to pull some cars inside.

Q. He had gone to pull some cars inside.

A. Yes.

Q. Tell the jury how you started the engine. It was not running when you got up there, was it?

A. No.

Q. How did you start it?

A. I had seen it. I had seen him hold that—I don't know what you call it,—down, like this. (Illustrating.)

Q. The lever?

A. Yes. I seen him hold th lever down. That is all I seen.

Q. Whom had you seen do that?

A. I don't know. He is not here,—that fellow.

Q. Did you ever see Billy England do it that way?

A. I seen him before once, but not that day.

Q. How did you know how to start the engine?

A. I didn't know how to start it. I just seen him do that before.

Q. You didn't know what would happen when you pulled any of those levers?

A. No; only I saw it going up and down.

Q. When you pulled this thing with your left hand, what happened?

A. That turned the engine.

Q. That turned the engine? Which way did the engine turn? Did it turn toward you or the other way?

A. Any place.

Q. Any place? Now when you pulled this lever down, or turned this lever down, did it pull the car?

A. Yes.

Q. Then when you let go of it, what happened?

A. Well, that handle has to be turned.

Q. The handle has to be turned?

A. The clutch.

Q. You have to turn the clutch, too, do you?

A. Yes.

Q. Did you do that?

A. I turned the clutch.

Q. Then what happened?

A. Then it ran.

Q. The engine ran then?

A. Yes.

Q. Did it draw the car up?



A. Yes.

Q. Did you know it would draw the car up when you turned it on that way? What did you do that for?

A. So as to pull the car up.

Q. How did you know that would pull the cars up?

A. I had seen the other fellows do it.

Q. What did you do when the car got up to where you wanted it to go?

A. I tried to stop it.

Q. How did you try to stop it?

A. I tried to stop it with the brake.

Q. Did you still hold on to the clutch?

A. I left that, and tried to step on the brake. The brake was shaky, and I missed it.

Q. It was light there, was it not? There was a light there, was there not?

A. Yes.

Q. You could see the machine?

A. Yes.

Q. You could see this brake shaking?

A. I could see it when I tried to step on it.

Q. You could see it?

A. I could see it, but I missed it.

Q. You missed it? But I say, you saw it there, did you? When you started to step, couldn't you see the brake?

A. Well, the rope was pretty close to me.

Q. Did you see this cog-wheel going around?

A. I seen it, but not when I started to step on the brake.

Q. But when the machine was running, couldn't you see the cog-wheel running around?

A. Yes.

Q. Do you know what makes it go around? Do you know what made it go around?

A. The electric made it go around.

Q. Do you know how the electric got into the machine? Didn't it get in there by some of those things you pulled?

A. I don't know that.

Q. Why did you pull them for, then? Why did you pull these levers if you didn't know what was going to happen?

Q. Why did you pull the levers in the first place?

A. When the cars were going up—

Q. (Interrupting.) You pulled them to start the engine, didn't you?

A. Yes, sir.

Q. That is what you wanted to do? You wanted to start the engine?

A. Yes.

Q. When you wanted to stop the engine, did you let go of the levers?

A. Yes.

Q. You let go of them?

A. Yes.

Q. Did anything stop at all?

A. I went to step on the brake to stop it.

Q. Did you ever see anyone try to step on the brake before?

A. No.

Q. How did you know it was a brake?

A. I could see the brake there around the wheel.

Q. You could see that that was a brake there for the purpose of stopping that wheel?

A. Yes.

Q. This cog-wheel,—how far away was that, can you tell,—the cog-wheel that you fell into?

A. That was pretty close. Not very far.

Q. It was right near? It didn't have any top on it, did it?

A. No; the brake was down here (indicating), and the wheel was up here (indicating).

Q. Up alongside of the brake?

A. Yes.

Q. It didn't have any top on it, did it?

A. No.

Q. It was revolving? It was turning around?

A. Yes.

Q. Going fast?

A. Going fast.

Q. Was it turning from you, or coming to you. Which way was it turning? Was it turning to you?

A. It was coming to me.

Q. Now, this brake,—did you have to put your foot up or down to get your foot on to it?

A. It is not very high. It is something like that. (Illustrating height of brake.)

Q. Just stand up and show the jury how you did that. Catch hold of the levers you had hold of.

A. It was just about like this. I stood here on this side of it. There is a brake on the side, like this, and I just tried to step on it quick, so that the rope would not lick me,—the rope that pulls the car out,—*I tried to step on it, and I missed it. I didn't step on it.*

Q. So you didn't step on the brake at all, but missed it?

A. I missed it and fell right in the wheel.

Q. Fell right in the wheel? If you had stepped on the brake as you started to, you would not have fallen, would you?

A. I don't know whether I would fall or not. I don't think I would. But if there was anything over those wheels, I couldn't put my hands in.

Q. None of those things that you caught hold of threw you into the wheel, did they?

A. Well, the brake threw me in.

Q. But you missed the brake entirely?

A. Yes.

Q. And you fell because you missed the brake?

A. Yes.

Q. Where was Jerry Milautz when this happened?

A. He was with the car.

Q. How far away was the car from you?

A. Not very far. About ten feet, or something like

that.

Q. Was he on the car, or just standing alongside of it?

A. He was going along side of the car, running. He tried to put the brake on, so it would stop.

Q. As the car came along up, he came with the car, did he?

A. Yes.

Q. Where was Strugel?

A. He was down at the place fixing something. I don't know what he was doing.

Q. He didn't come up with the car at all, did he?

A. Not at that time.

Q. He didn't come up until after you got hurt?

A. He came up when I got hurt.

Q. Where was Louis at this time?

A. He was inside some place at that time.

Q. He wasn't anywhere around there, at all, was he?

A. No.

Q. He was somewhere else in the mine?

A. Yes.

Q. Did he come there when you got hurt?

A. When I got hurt he come around.

Q. Jerry Milautz and Strugel came up, did they?

A. Yes.

Q. Did you tell Jerry how it happened?

A. I hollered to him. I said, "Hold me; I am on the wheels."

Q. Who stopped the machine?

A. My hand stopped the machine.

Q. Your hand stopped the machine?

A. Yes.

Q. It stopped as soon as you fell into it?

A. Yes.

Q. Who helped you out of it?

A. Jerry Milautz and Strugel.

Q. Was Louis there then?

A. Louis come up after that.

Q. Where did they take you? Did they take you out of the mine?

A. Yes; they took me out of the mine. They put me on a car, and took me out.

Q. Did you ask Jerry Milautz to go up and pull the car up?

A. No.

Q. You had seen him there working with the cars right along, had you not?

A. Yes; I seen him. He was the rope rider.

Q. That was his business? It was his business to get those cars up, was it not?

A. Whose?

Q. Jerry's?

A. No; he was just a rope rider.

Q. Well, it was his business to hook the cars on and get them up?

A. Yes; that was his business.

Q. That was his business?

A. Yes.

Q. It was not your business?

A. No.

Q. Your business was to fill the cars?

A. Yes.

Q. How long before had you seen England that morning?

A. I don't remember whether I seen him that morning or not.

Q. Had you seen anybody else pulling any cars up that morning?

A. No; I didn't see it.

Q. How far inside of this slant—you call that a slant, don't you, where you were working? You call that a slant where you were working at that time?

A. Yes; we call that a slant. It goes back in. I was working in an entry. This place had been worked thirty feet.

Q. What do you call this place where you haul the

cars up? Do you call that a slant?

A. Yes; that is what I call a slant. That was an entry where I was working. It was an air course.

Q. And it was a slant where they were pulling the coal up?

A. Yes.

Q. When they got the cars up to the engine, they hooked the cars all together, and hauled them out with a mule, didn't they?

A. Yes.

Q. That is what England did? He pulled the cars up, and hooked them together, and moved them out, didn't he? That is what Billy England was doing?

A. He was driving; yes.

It appeared in the testimony of one of the defendant's witnesses that the plaintiff had operated this engine in No. 1 slant (Trans. p. 240) and the plaintiff was called in rebuttal, and testified (Trans. pp. 247-248) that he worked in the No. 1 slant for about a year with one Tony Vassar as his partner; that on the 11 o'clock shift the coal was hoisted by his partner and that he (the plaintiff) never operated the engine but always rode upon the car. Frank Strugel testified that he was with the plaintiff when the foreman told him that if the driver was not there "they had to pull the cars up themselves." (Trans. p. 69.) That he, Strugel, didn't say anything to the foreman, but that the plaintiff said, "We will do it if we can," and that the foreman said, "Try it if you can." (Trans. p. 72.)

Jerry Milautz, the rope rider, testified to what he saw of the injury. He also testified that he had been running the engine that morning and frequently ran it when he had anybody to ride the car. (Trans. p. 86.)

Nate Drummond, a witness for plaintiff, who was called

as a machinist who had set up and worked this engine, testified as follows, among other things (Trans. p. 111):

“Q. How far would the man be from this revolving uncovered cog-wheel when he was standing there prepared to throw the machine in or out of gear?

A. Standing there in the proper place, he would be within about a foot and a half, I should judge.

Q. Standing above, or on the same level?

A. About on the same level.

Q. About how far is the uncovered cog-wheel from the treadle of the brake?

A. About the same distance; about a foot, or a foot and a half?

Q. About a foot?

A. About a foot, or a little over.

Q. Is it to the left or to the right of the brake?

A. To the left.

Q. Standing there with his left hand on the controller lever?

A. Yes, sir.

Q. And putting his foot on the brake treadle, the exposed cog-wheel would be revolving about a foot away from him, upon the left side?

A. Yes, sir; or a foot and a half; such a matter.

Q. Could a man standing there see this revolving cog-wheel if the light was burning in its usual condition?

A. I should think so; yes, sir.

Q. Now, the operation which you have described was the ordinary operation of that machine, as it was there placed, was it not?

A. Yes, sir.

Q. That is the way it was operated every time it was operated by anybody?

A. Yes, sir.”

We have called the court's attention to the above extracts of the testimony because we believe that they show clearly that the plaintiff was an experienced miner, of

ten years' work in this mine where this engine was in daily use; that in spite of his denial of facts and knowledge, it is clear from his own testimony that he knew as much about the operation of this engine as any one about the mine, and that if he had never actually operated it before the accident, he was the only man around the mine of whom that could be said. These facts will be emphasized by a reading of all of the evidence introduced on behalf of the plaintiff. From them the deductions are inevitable and necessary.

The plaintiff was a volunteer in the operation of this engine. He was told, according to his testimony, that he would have to hoist the cars when the driver was not around. But there was a driver within easy call. The rope rider in charge of the car, who knew how to operate the engine, was at his post, but no request was made of him to operate it. When the foreman told the plaintiff that he would have to hoist the cars, the plaintiff made no protest and gave no indication of an ignorance and lack of experience such as would call for active instructions. He had worked in the mines longer than the foreman had, and made no suggestion to the foreman that he was unable or unwilling to operate the engine. It was of simple construction, easily operated by everybody else, even those without any experience at all, and it was a machine of common use. We respectfully submit that there was no evidence to justify the submission to the jury of the question as to whether the plaintiff was required to operate the engine.

Again, it is apparent from all of the testimony that the danger of injury from falling into the exposed gearing of this machine, as well also from undertaking to operate it uninstructed, was obvious and ordinary and



plainly apparent and appreciated by a person of ordinary intelligence. *Judge Sanborn in St. Louis Cordage Co. vs. Miller*, 126 *Fed.* 495, 63 *L. R. A.* 551, thus lays down the rules supported, as he says by the great weight of authority in the United States, as well as by the opinions of the Supreme Court:

“A servant by entering or continuing in the employment of the master without complaint assumes the risks and dangers of the employment which he knows and appreciates, and also those which an ordinarily prudent person of his capacity and intelligence would have known and appreciated in his situation.

“A servant who knows, or who by the exercise of reasonable prudence and care would have known, of the risks and dangers which arose during his service, but who continues in the employment, assumes those risks and dangers to the same extent that he undertakes those existing when he enters upon the employment.

“Among the risks and dangers thus assumed are those which arise from the failure of the master to completely discharge his duty to exercise ordinary care to furnish the servant with a reasonably safe place and reasonably safe appliances and tools to use.”

“Assumption of risk and contributory negligence are separate and distinct defenses. The one is based on contract, the other on tort. The former is not conditioned or limited by the existence of the latter, and is alike available whether the risk assumed is great or small, and whether the danger from it is imminent and certain or remote and improbable.”

“The court below fell into an error when it instructed the jury that although the plaintiff continued in the employment of the defendant by the side of the visible unguarded gearing with full knowledge that the cogs which injured her were uncovered, still she could not be held to have assumed the risk of working by their side unless the danger from them was so imminent that per-

sons of ordinary prudence would have declined to incur it under similar circumstances. *Choctaw O. & G. R. Co. vs. McDade*, 191 U S. 64; 48 L. Ed. 96."

After further discussion of the proposition that the question before the court at the close of the testimony is not whether or not there is any evidence, but whether or not there is any substantial evidence upon which a jury can properly render a verdict for the plaintiff, the court says:

"The machinery, the cogs, the slippery lever and their relation to each other, were open, visible, known. There was nothing recondite, imperceptible, uncertain in the danger impending from them. It was plain and certain that if the employee permitted her hand to slip between the revolving cogs that hand would be injured. The defect of the unguarded cogs was obvious, the danger from it was apparent. and, without a disregard of the rules to which we have adverted and the decisions of the Supreme Court and of the other courts of the country to which reference has been made, there is no escape from the conclusion that the evidence in this case established without contradiction or dispute the facts that the plaintiff, by continuing in her employment without complaint, in the presence of an obvious and known defect and of a plain and apparent danger, assumed the risk of the injury of which she complained, so that she never had any cause of action against the defendant."

But it is contended as the chief element in the cause of action that defendant should have instructed the plaintiff as to the operation of the engine. The plaintiff's testimony shows that he knew how to operate the engine. His experience and employment were such as to entitle the defendant to believe him qualified to run the engine. He made no objection or protest when directed to run the engine, and said nothing to indicate that he was

inexperienced or ignorant. The Supreme Court of Montana, in *Forquer vs. Slater Brick Co.* 97 Pac. 843, thus deals with this question, adversely to plaintiff's contention:

"3. Was the defendant guilty of negligence in failing to explain to plaintiff the dangers to be apprehended from the machinery? The first question involved is one of pleading. It is alleged in the complaint that plaintiff was 13 years of age, wholly unskilled in the use of machinery, and that defendant was negligent in not explaining to plaintiff the dangers to be apprehended. There is no allegation that plaintiff was not as intelligent as the average boy of his age, and we must conclude, therefore, in the light of his testimony, that he was. There is no allegation that plaintiff was inexperienced in the use of such machinery, but, without objection, he testified that he was. No complaint is made of a failure to warn the plaintiff, unless that omission be involved in the failure to explain the dangers to him. We dwell upon this question of pleading, not because the appellant urges the same as fatal to a recovery, but because it is necessarily involved in the disposition we make of the appeal. After carefully reading the testimony, we are convinced that it cannot be claimed that parts of the machine in question were not obviously dangerous, or that plaintiff did not know and understand wherein the danger lay. That is to say, it was apparent that, if a person's hand came in contact with the cogs of the knives while the machine was in motion, injury would probably result. Plaintiff knew this. It was obvious. It was unnecessary to tell this to the boy or explain it to him. He knew all about it. Therefore it was unnecessary and would have been useless to give him any information on that subject, and no negligence can be predicated upon defendant's failure to do so," citing numerous authorities.

This brings us then to the proximate cause of the accident, which according to plaintiff's testimony was

not the lack of instruction as to how to operate the machine, but the fact that he failed to put his foot on the brake. No amount of instruction could have avoided the injury after the plaintiff had failed to put his foot squarely on the brake treadle. The plaintiff saw the brake, and saw its oscillations and vibrations. He knew the part it played in the operation of the engine. He knew also the necessity of putting his foot on it, and the danger of injury from falling into the machine was obvious. These were the things of which the employer could have warned him. And yet with a full knowledge of all these he threw his weight upon his foot without being sure that it was on the brake, and missing it fell into the machine. It was the risk of this danger which the plaintiff assumed when he undertook without objection, and upon his own volition, to operate the engine.

We therefore submit that the Court erred in refusing to withdraw the case from the jury, for the reason that there is no substantial evidence in the case upon which the jury could base a verdict for the plaintiff.

Respectfully submitted,  
CARPENTER, DAY & CARPENTER,  
Attorneys for Plaintiff in Error.

176 Fed. 211.

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT

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THE MONTANA COAL & COKE COMPANY,  
(a Corporation),

*Plaintiff in Error,*

vs.

ANDREW KOVEC,

*Defendant in Error.*

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### BRIEF OF DEFENDANT IN ERROR.

There is but one question presented by this appeal, and that is whether, on the evidence, the case should have been submitted to the jury, and in the brief of plaintiff in error the question is viewed and discussed in a three-fold aspect.

First, it is contended that in the operation of the engine the defendant in error was a volunteer. Second, that the facts disclose an assumption of risk, and third, that the contributing negligence of the defendant in error is responsible for the injury.

Before discussing the law, which, on the undisputed facts, as we contend, disposes of the controversy adversely to plaintiff in error, we believe a fuller statement of the facts might be indulged in.

The defendant in error at the time of the injury was

twenty-nine years old and had been in the employ of the Montana Coal and Coke Company for a number of years as a coal digger. These coal mining operations were carried on underneath the ground and in these operations he had nothing whatever to do with machinery of any character.

Transcript, page 34.

In the mine where he worked, for the hauling of cars electric engines were used, and the electric engine which defendant in error tried to operate at the time he was injured was in one of the subterranean passage-ways of the mine at a depth of nearly a mile from the surface.

Transcript, page 90.

The engine was at and near what was called the main entry and at the top of a slant and was used to haul cars out of the slant to the main track.

Transcript, page 90.

The top of the slant or the knuckle as it was called was about thirty feet distant from the engine, and for the purpose of furnishing light there was an electric bulb at the machine over the head of the operator, and thirty feet distant another electric light was installed so that the operator could see when the cars came over the knuckle. This latter light, however, was in no way helpful in connection with the operation of the machine.

Transcript, pages 121-122.

The engine itself, referred to in the brief of plaintiff in error as a simple affair, was we submit complex in mechanism and operation.

In order to operate it successfully and escape injury the services of all the organs of the body were required simultaneously.

William England, speaking of its mechanism, testified as follows:

"Q. So that really, then, when you were operating the engine there, to what matters did you have to give attention?

"A. Well, you fixed the engine first and then you had to give attention to the cars when they were coming up.

"Q. Did you have to use your hands at all?

"A. Yes, sir, you had to use one on the clutch and one on the lever.

"Q. Did you have to use your feet?

"A. Yes, sir, one foot for the brake.

"Q. Did you have to use your eyes?

"A. Yes, sir.

"Q. What would you be using your eyes upon?

"A. Watching the cars."

Transcript, page 125.

This electric bulb to which reference has already been made as furnishing light, sometimes furnished a reduced light when the electric supply was subjected to a heavy burden for motive purposes,

Transcript, page 124,

and as the cars were brought to the knuckle and over it and when the rope which was fastened to the cars and which revolved around the drum of the engine was disconnected, extreme watchfulness on the part of the engine operator was called for, otherwise there was a likelihood that the rope swinging, and having on its end a metallic

arrangement, might strike the operator and inflict a grievous, if not, a fatal injury upon him.

Testimony of Drummond, pages 102-103,  
and of England, pages 124-125.

The brake was underneath and was operated by pressing the foot upon it,

Transcript, page 125,  
and was no wider than the sole of a man's shoe,

Transcript, page 126,  
and when the engine was in operation this brake was constantly shaking.

Transcript, page 126.

The gearing, containing cog wheels, was on the left hand side of the operator, and about one or two feet away from him without any shield or covering.

Transcript, page 127.

This gearing so exposed, with the danger of missing the brake, was considered not safe.

Transcript, pages 127 and 104.

Mr. Drummond, testifying about this exposed gearing, said:

"Q. At the time you installed the machine there, do you know whether or not there was any guard or shield over these cog wheels?

"A. No, sir, there was no shield or guard there.

"Q. What have you to say as to whether or not, if a person conducting operations there should slip in any way there would be any likelihood that he could get into that cog wheel business?

"A. Yes, sir.

"Q. Now, having in mind the machinery as it was there, and what might likely happen in connection



with the operation of that machinery, would you say that those cog-wheels that were exposed were reasonably safe in the case of even an experienced man in that department?

"A. No, sir.

"Q. And how would it be in the case of an inexperienced man who did not understand how to operate, would you say that these cog wheels were reasonably safe there for such a person?

"A. I think it would be all the worse for him.

Transcript, page 104.

And as to the machine itself, the evidence is:

"Q. Do you think that it requires any experience to operate one of these engines?

"A. You have got to be shown how to run it all right."

Transcript page 119.

This was the machine that the defendant in error was directed to operate at the time he was injured. It is true he saw the machine at different times and undoubtedly this fact was known to the plaintiff in error. He saw it, not in open daylight, but beneath the surface of the ground, and with a light at best unfitted to make possible a full inspection. This exposed gearing, it is true was before him, but it became dangerous only in the event of his stumbling, and the occasion of his stumbling or the possibility of his stumbling could only arise by missing the treadle or brake. The plaintiff in error knew that this brake had a tremulous motion when the machine was at work. With this tremulous motion there was a constant danger of missing the brake and without it there was scarcely any danger that this would occur and the failure of the defendant in error in this particular alone to advise

this inexperienced servant called away from his regular employment, of this lurking danger would be sufficient to fasten responsibility upon it.

Having in mind the facts as here stated, we will now invite the attention of the court to the principles of law which have application, and as to which, as we contend, there is no diversity of view.

"It is also insisted for the appellant that the injury which the plaintiff sustained was incident to his employment, and that he assumed the risk. The mere fact that the respondent was aware that the cage was shaking, and not running smoothly, is not sufficient to justify us in holding that he has assumed the risk, and there is no evidence to show that the defects were of such an obviously dangerous character that he ought to have appreciated the risk and ceased his employment, or that a man of reasonable precaution, placed under similar circumstances would have done so. It is shown that the plaintiff was not skilled in mechanic arts, had never worked in a machine-shop, and never had anything to do with machinery, except in this mine. Therefore, he had the right to rely, at least to a reasonable extent, on the judgment of his employer, who is presumed to have a knowledge of the machinery used in his business, and to assume that he would discharge his duty by furnishing reasonably safe machinery, and keeping it in proper condition and repair. Where an employe has knowledge of defects in machinery used in his employment, and the defects are not so dangerous as to threaten immediate injury, or the danger is not such as to be reasonably apprehended by him, his continuance in the service will not defeat a recovery for injuries resulting from such defects. If, however, the defects are so obviously and immediately dangerous that a person of ordinary prudence and precaution would refuse to use the machinery, then, if the servant continues its use, he assumes the risk. We think it was a question for the jury to determine whether, under all the circumstances in evidence in this case,

the employe by continuing in his employment with knowledge of the defects, assumed the risk of the injury which he sustained. 'Mere knowledge of the defects is not sufficient, unless it does or should carry to a servant's mind the danger from which he suffered. A servant may assume that the master will do his duty; and therefore, when directed by proper authority to perform certain services, or to perform them in a certain place, he ordinarily will be justified in obeying orders, subject to the qualification that he must not rashly or deliberately expose himself to unnecessary and unreasonable risks which he knows and appreciates. It is one thing to be aware of defects, and another to know and appreciate the risks resulting therefrom.' Thomas on Negligence, 851."

Tuckett v. American Steam etc. Laundry, 116 Am. St. Rep. 842-843.

"The doctrine of assumption of risk is wholly dependent upon the servant's knowledge, actual or constructive, of the dangers incident to his employment. Where he knows, or in the exercise of reasonable and ordinary care should know, the risk to which he is exposed, he will as a rule be held to have assumed them; but where he either does not know, or knowing, does not appreciate, such risks, and his ignorance or non-appreciation is not due to negligence or want of due care on his part, there is no assumption of risk. 26 Cyc. 1196; Roth v. N. P. L. Co., 18 Or. 205, 22 Pac. 842; Carlson v. Oregon Short Line Ry. Co., 21 Or. 450, 28 Pac. 497; Wagner v. Portland, 40 Or. 389, 60 Pac. 985, 67 Pac. 300; Geldard v. Marshall, 43 Or. 438, 73 Pac. 330. Larsen entered the employment of the defendant as an ordinary laborer to dig and shovel dirt in the bottom of a trench. He did not thereby impliedly represent to the defendant that he had any knowledge or skill in digging a tunnel or constructing a sewer. The evidence shows that he was a cement worker, and had little skill in handling a pick and shovel, or, as stated by one witness, 'he handled a shovel like a green hand.' When told by the master to begin digging into the bank for a tunnel, he must have seen that it was 25 feet high, and that no pro-

tection against its falling or caving had been made by his employer. But there is a difference between knowledge of the surrounding circumstances and appreciation of a risk. *Roth v. Northern Pacific Lumbering Co.*, *supra*. In that case it is said that 'one may know the facts, and yet not understand the risk'; or, as Mr. Justice Byles observed: 'A servant knowing the facts may be utterly ignorant of the risks.' *Clark v. Holmes*, 7 Hurl. & N. 937. For, after all, Mr. Justice Hallet said: 'It is not so much a question whether the party injured has knowledge of all the facts in his situation, but whether he is aware of the danger that threatens him. What avails it to him that all the facts are known, if he cannot make the deduction that peril arises from the relation of the facts? The peril may be a fact in itself of which he should be informed.'"

*Millen v. Pacific Bridge Co.*, 95 Pac. 198.

"The appellee, at the time of his injury, was not engaged in performing ordinary labor, but was at that time under the direction of his foreman, engaged in a most hazardous and perilous undertaking, which rendered the appellant liable for his injury: *Graver Tank Works v. O'Donnell*, 191 Ill. 236, 60 N. E. 831; *Springfield Boiler, etc. Mfg. Co. v. Parks*, 222 Ill. 355, 78 N. E. 809. \* \* \* In *Offutt v. World's Columbian Exposition*, 175 Ill. 472, 51 N. E. 651, it was said: 'The rule is, that where the servant is injured while obeying the orders of his master to perform work in a dangerous manner the master is liable, unless the danger is so imminent that a man of ordinary prudence would not incur it.' The question whether the execution of the order of the foreman was attached with such danger that a man of ordinary prudence (even though he knew of the danger which he encountered) would not have incurred such danger by going upon the plank and attemptng to raise said block and fall with his hands was a question for the jury, and not one to be determined by the court as a question of law."

*Kennedy v. Swift & Co.*, 123 Am. St. Rep. 115-116.

"In this case, however, if the theory of the plaintiff was sustained by the evidence, the employe was suddenly called to a place of danger by the order of his superior. In such a situation the master is presumed to know whether the place or instrumentality is reasonably safe, and the servant may rely upon that assumption, unless the danger is so obvious that a prudent man in the same circumstances would not encounter it, even with the assurance that such presumption affords. The servant, acting in good faith, upon an order of his superior, may rely upon the instrumentalities being in their usual condition and fit for use, where he does not have knowledge, and is not chargeable with notice to the contrary. In such a situation he may rightly rely upon the assumption that his employer has done his duty by furnishing reasonably safe machinery, appliances, and surroundings. Thompson on Negligence, Sec. 3765; Mo. Pac. Ry. Co. v. Barber, 44 Kan. 612, 24 Pac. 969. The order is considered to be an implied assurance that there is no abnormal danger. Labatt, Master & Servant, Sec. 440c. Whether the plaintiff was negligent in the performance of the duty assigned to him must be determined in the light of the situation in which he is placed. If his act was such as a reasonably prudent man would have done, it was not negligent, although some other course would have been absolutely safe. Brinkmeier v. Railway Co., 69 Kan. 738, 77 Pac. 586. It must be remembered that this was a sudden call to a dangerous service which had to be performed then, or not at all. He was bound to use the discretion and judgment that a prudent man would in that situation. If it was a palpably reckless or foolhardy risk, he cannot be excused. If it was such as a prudent man would have performed, he might undertake it, although hazardous. The same rule applies to the manner in which the service was performed. Called to the service, he was bound to use such means as reasonable prudence dictated in the emergency in which he was placed. Whether he ought to have undertaken the work, and whether he made use of reasonable means in performing it, were questions properly submitted to the jury."

St. Louis & S. F. R. Co. v. Morri, 93 Pac. 156.

"In hiring out as a carpenter plaintiff impliedly represented himself as competent to perform the duties devolving upon workmen peculiar to that trade, and the employer might proceed on that theory, but from his undertaking to do carpenter work the company did not have the right necessarily to infer that he was familiar with the dangers in operating a buzzsaw. As said, plaintiff was without experience in the operation of machinery, and the jury might have found that he did not indicate anything to the contrary. He was not warned of the danger, and in the circumstances disclosed whether defendant was negligent in failing so to do, and whether he assumed the risk and was guilty of contributory negligence, were issues appropriate for the decision of the jury. \* \* \* The decisions establishing the principle are too numreous for citation. It is well expressed in Labatt on Master & Servant, Sec. 241: 'On the other hand, the master may properly be found guilty of negligence whenever instruction was not given under circumstances which were of such a nature that he was not justified in acting on the assumption that the servant appreciated the risk involved, and that, on the other hand, culpability cannot be predicated of the omission to give instruction if the master had good grounds for supposing that the servant understood the risk. Before an employer can be held liable for a failure to warn, there must be something to suggest to him that a warning is necessary. Unless this necessity was, or ought to have been, known to him, he is considered to be justified in acting upon the assumption that the servant understood the dangers to which he was exposed, and would take appropriate precautions to safeguard himself.' The only difficulty is in the application, and all held that the issue was for the jury."

Harney v. Chicago, R. I. & P. Ry. Co., 115 N. W. 887.

"Upon this point the circuit judge properly charged the jury that it was the duty of the defendant foreman, before setting him to work in operating the jointer, to explain to him its mode of successful opera-

tion, its dangers to the unskilled, and the care and attention demanded from its operator, and that the degree of instruction to be given to the servant depends upon the age and experience of the servant and the dangerous character of the machine he is directed to operate. This instruction was in harmony with the decisions of this court in *Ertz v. Pierson*, 130 Mich. 160, 89 N. W. 680, *Allen v. Jakel*, 115 Mich. 484, 73 N. W. 555, and *Braasch v. Michigan Stove Co.*, 147 Mich. 676, 111 N. W. 197."

*Marklewitz v. Olds Motor Works*, 115 N. W. 1002.

"Respondent was injured while operating a jointer machine in appellant's factory. He was 38 years of age, a foreigner, had been in America five years, and was a cabinet maker by occupation. In another factory belonging to appellant he had from time to time operated a similar jointing machine, and for two months prior to the accident had occasionally operated the jointer in question in the new factory. He was an experienced cabinet maker, but not a machine operator, and his experience with jointing machines was incidental to his work as cabinet maker. The board kicked back and broke, thus throwing his left hand into the knives. The evidence clearly indicates that it was practicable to guard the machine with what is known as an automatic or stationary guard. \* \* It was established by the evidence that such machines had a tendency to kick back when small pieces of wood were passed through, especially if the knives were not in perfect shape, or if the wood was not accurately held. Respondent was directed by the foreman of the shop to plane off certain short pieces of wood, which were being used by him in the construction of some cabinet work. He knew the machine was not furnished with a guard, and, after using it awhile, discovered that one of the knives contained a nick, and noticed that the machine was not perfectly steady; but, owing to his limited experience, it cannot be said as a matter of law that he understood the danger and appreciated the risks of passing that kind of material through the machine."

*Bigum v. St. Paul Sash, Door & Lumber Co.*, 119 N. W. 481.

"It is the duty of the master not to expose an inexperienced servant and one unfamiliar with the employment and risks attendant thereon to a dangerous service, without giving him warning of the danger and instruction how to avoid it, unless both the danger and the means of avoiding it while he is performing the service required are apparent to the servant, and particularly is this true when the servant is ordered or directed to perform some service not contemplated in his original contract of employment.' The obligation which the law thus imposes on a master, to warn a servant of the dangerous character of the instrumentalities about which he is required to perform labor, is frequently invoked in behalf of an employe of immature years, because such a person does not ordinarily appreciate the hazard to which he is exposed, or practice that degree of discretion which servants of riper years usually estimate and generally exercise. This duty is not limited to an adolescent employe, however, but extends also to an adult servant who is inexperienced. Thus, in *Ingerman v. Moore*, 90 Cal. 410, 422, 27 Pac. 306, 25 Am. St. Rep. 138, in discussing this subject Mr. Justice Dehaven says: 'It is true, this rule, which requires the employer to give proper instructions, is most frequently applied in cases where persons of immature years are employed about dangerous machinery; but the same principle governs where the person so put to work is of mature years, but without experience in the particular work, and without knowledge of the actual dangers attending it. But, of course, the fact that the person injured was of mature years, as was the plaintiff here, is a matter for the careful consideration of the jury in determining whether he fully understood and appreciated the dangers of his position.'"

*Elliff v. Oregon R. & N. Co.*, 99 Pac. 79.

"It will appear from the statement of the case that there was some evidence tending to show that the defendant in error was an inexperienced servant, and was changed from the work to which he had become accustomed, and set at work which involved greater



danger, without any warning or instruction as to the safest mode of doing the new work. Under such circumstances, and in this state of the case, we think the question of contributory negligence was a question of fact for the jury to determine. In view of such a state of the case, if the jury should find that the defendant in error was not sufficiently experienced to enable him to do the new work, and that he was neither warned nor instructed as to the proper mode of doing the work, we conclude that it could not be said as matter of law that the servant was guilty of contributory negligence in not making an inspection of the pole for himself, and in the particular method adopted of sawing off the section of the pole. It could not be said, upon the fact of this case, that defendant in error was guilty of negligence as matter of law if he supposed the pole was sound, and that he might safely do the work as it was done. If the pole was regarded, upon reasonable ground, as sound, it could not be said that the method of sawing, up to the time the section broke off and fell, was an obvious danger to an inexperienced servant without instruction or warning."

**Western Union Tel. Co. v. Burgess, 108 Fed. 31.**

"The plaintiff was 21 years old. He came from a farm to the defendant's pulp mill about two weeks before the accident. He had been a logger in the woods, but had not before worked on machinery. During these two weeks he had been 'lugging wood to use into the stove,' 'feeding the rack,' and 'cutting slabs' on a circular saw. Two or three times before the accident he had worked on the barker without difficulty from three-quarters of an hour to an hour. In the middle of the night he was roused from his bed by the night boss, and was set to work on the barker. About two hours later he barked a slab which still carried the spikes formerly driven into it. The sparks flew, and the knives were dulled. There was evidence tending to show that slabs having knots in them 'jumped' more than others when held against the barker; also that the jumping was greater when the knives were dull. The operator was then compelled

to increase his pressure on the slab against the disk. The jumping was generally away from the barker against the operator's pressure, but, two or three hours after the plaintiff's encountering the nails, a slab which he was pressing against the barker was thrown violently from the disk, his hands came in contact with the knives, and he lost three or four fingers. There was evidence that this more violent jumping occurred infrequently, once or twice a week. The plaintiff had never seen it, and testified that he had not been warned about it. The defendant asked the court to direct a verdict in its favor. The learned judge refused, and the defendant duly excepted. The jury found a verdict for the plaintiff, and the defendant brought this writ of error. In this court the defendant rested its case upon the plaintiff's alleged assumption of the risk involved in the operation of the barker, and his alleged contributory negligence.

"But the plaintiff had little experience with machinery, and had worked but little upon the machine in question when he was aroused at midnight, five or six hours before the accident happened. That the barker was in some respects dangerous he knew; that logs and slabs did not always lie quiet against the revolving disk his experience had proved. He found himself compelled to hold them there by the exercise of some force, but the evidence warranted the jury in finding that he did not know, when the dulled knives came in contact with knots or like obstacles, that the slab would occasionally be flung from the barker with great and extraordinary force beyond his strength to hold the slab in place, so that the protection given his hands by the slab might be suddenly removed and his fingers cut off. This danger called for a warning, and there was evidence that no warning had been given. Under all these circumstances, we are not able to say that the learned judge of the court below erred in submitting to the jury, under instructions otherwise unobjectionable, the question of the plaintiff's assumption of risk and contributory negligence."

In the light of these decisions and with the facts shown to exist, it is claimed that the case should not be permitted to go to the jury. With such a contention we are emphatically at war.

In the case of

Busch v. Robinson, 81 Pac. 239,

the court said:

"The next question in such order arises upon the motion for a non-suit. Much the same argument is advanced for defendant in support of the motion as in support of the assignment of error with relation to the demurrer, but it is supplemented by the further contention that plaintiff was guilty of contributory negligence. It was the duty of the defendant to furnish the plaintiff a safe place in which to work, and safe appliances to work with. This, as a principle of law obtaining between master and servant, is conceded. The contention involves three elements of inquiry: (1) Was the defect open and obvious? If not (2), did the plaintiff have knowledge of it, and continue in her employment with such knowledge? And (3) did the defendant have knowledge thereof, or should he have known of it if he had been reasonably diligent and cautious in observing the condition of the machine and its appliances, for the protection of his employees? All of these are matter of fact for the determination of a jury."

The Supreme Court of the United States in a decision recently made, announced the rule as to when a case should be disposed of by the court:

"Where the elements and combination out of which the danger arises are visible it cannot always be said that the danger itself is so apparent that the employee must be held, as matter of law, to understand, appreciate, and assume the risk of it. Texas & P. R. Co. v. Swearingen, 196 U. S. 51, 49 L. Ed. 382, 25 Supt. Ct. Rep. 164; Fitzgerald v. Connecticut River

**Paper Co. 155 Mass. 155, 31 Am. St. Rep. 537, 29 N. E. 464.** The visible conditions may have been of recent origin, and the danger arising from them may have been obscure. In such cases, and perhaps others that could be stated, the question of the assumption of the risk is plainly for the jury. But where the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and the dangers are obvious to the common understanding, and the employee is of full age, intelligence, and adequate experience, and all these elements of the problem appear without contradiction, from the plaintiff's own evidence, the question becomes one of law for the decision of the court. Upon such a state of the evidence a verdict for the plaintiff cannot be sustained, and it is the duty of the judge presiding at the trial to instruct the jury accordingly."

**Butler v. Frazee, 29 Sup. Ct. Rep. 138.**

Having in mind the foregoing principles of law, which are axiomatic, we submit that the doctrine of assumed risk is out of the question. The defendant in error was employed as a coal digger and the risks incident to that employment be assumed. He was taken from his employment for the moment and directed to run this engine, plaintiff in error not justified legally in assuming that he possessed any special knowledge regarding it. The conditions were such that he could not ordinarily appreciate the risks that this work exposed him to, and while he could observe the unguarded cog wheels negligently left unguarded, the danger to his inexperienced mind was not obvious. The brake presented an unseen and latent risk which only became patent when the engine was in action, and under the circumstances the duty devolved upon the plaintiff in error, in sending him to run the

engine, to advise him of the dangers to which he was thus exposing himself. The question as to whether he was negligent on this state of facts and as to whether the risks were such that he was reckless in undertaking the work were for the jury to determine, and they were submitted to the jury under instructions of remarkable lucidity and clearness. The instructions referred to are as follows:

"There are certain duties which the law imposes upon a master toward his servant, in reference to providing for him a reasonably safe place in which to work, and reasonably safe appliances with which the work may be done. The servant has the right to assume that the master has used due diligence to provide suitable appliances for the operation of his business, and does not assume the risk of the employer's negligence in performing such duties. The employee is not obliged to pass judgment upon the employer's method of prosecuting his business, but he may assume that reasonable care will be used in furnishing the appliances necessary for its operation. This rule is subject to the exception that where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of such knowledge without objection, without assuming the hazard incident to such a situation. In other words, if he knows of the defect, or if it is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and if, in such a case, he is injured through the use of such defective apparatus, he cannot recover. You will remember that the law does not impose upon the master the necessity of providing machinery or appliances which are absolutely safe. It imposes upon him the obligation to use reasonable and ordinary care, skill and diligence in procuring, furnishing and maintaining suitable and safe machinery.

"When a servant enters into the service of an em-

ployer, he impliedly agrees that he will assume all the risks which are ordinarily and naturally incident to the particular service, in which he engages, and if, in this case, you believe that the injury to Kovec was only the result of one of the risks ordinarily incident to the work in which he was engaged, and not otherwise, then he can not recover, and your verdict should be for the defendant;

"The question of assumption of risk is perhaps best understood when we consider the many employments which men seek. Some are very hazardous. Mining is a hazardous employment. When a man goes into mining, he takes upon himself those risks which are ordinarily connected with the business of mining. When a man works in a smelter or other places where streams of molten metal are coming out, he undertakes a very hazardous employment. The nature of the business, in itself, is hazardous, and he goes into it assuming those risks which are ordinarily incidental to the business so undertaken by him.

"The law imposes upon the master the degree of care that I have explained to furnish reasonably safe appliances, and it imposes upon the servant the duty of exercising ordinary care to prevent being injured. The duties are correlative. Duties are imposed upon master and upon servant. Common experience tells us this. We think of the situations that are presented to men in factories undertaking employment where they are surrounded by dangerous machinery. The law must require the care commensurate with the nature of the business on the part of the master, and the care commensurate with the nature of the business on the part of the servant.

"I think I have already told you that when the servant, in accepting his employment, he does not assume those occasioned by the negligence of the master. In this case, Kovec assumed the ordinary risks incident to the work he was called upon to perform; yet he did not assume those,—if there were any such,—arising from the negligence of the defendant company. You will remember that Kovec says that he was employed as a coal digger, and was acting in that capacity in the employ of this defendant; that he was never employed by the defendant to operate ma-

chinery, and never represented to the company, either expressly or impliedly, that he had any knowledge of machinery; and that on the day of the accident, he was directed by the representative of the company to operate the hoisting machine; that the work connected with its operation was dangerous; and that he was ignorant, through inexperience, of these dangers; all of which facts, he says, were known, or by the exercise of reasonable diligence, could have been known, by the defendant. If you find these facts to be true, then the duty devolved upon the defendant company, before exposing the plaintiff to such dangers, to instruct and caution him in such a manner that he would be able to comprehend such dangers, and do the work with reasonable safety and proper care on his part. If you find from the evidence that these are the facts, and that the injury complained of by Kovec, resulted from this failure to instruct him, he would be entitled to recover, unless you should find that in operating the engine in question, he assumed the risks incident to its operation, as explained to you, or unless the injury that he received was the result of contributory negligence on his own part.

“Now, a master may not lawfully expose his servant to greater risks than those pertaining to the particular service for which he was engaged, and against which, the servant, through want of skill, could not presumably defend himself if not advised of danger. He is bound to warn the servant of the danger, if it is not obvious, and to instruct him how it may be avoided. But if the servant be of mature years, and of ordinary intelligence and experience, he is presumed to know and comprehend obvious dangers. In such cases the master is not liable for injury happening to the servant in the performance of dangerous work, without the scope of his ordinary employment, merely because he has been directed by the master to perform such work. If the servant is possessed of knowledge and experience sufficient to comprehend the danger, and, without objection, undertakes the service, the master is not liable for injury received by the servant in such new and more dangerous employment. The liability upon the master in cases of injury to the servant received in a dangerous employ-

ment outside of that for which he was originally employed, arises not from the direction of the master to the servant to depart from the original service, and engage in the more dangerous work, but from the failure of the master to warn the servant of the attendant danger in cases where the danger is not obvious, or where the servant is unable to comprehend the danger. The master is under no obligation to warn against dangers which are obvious and ordinary; but the master owes the duty to the employee who is directed to perform a hazardous or dangerous task, or to work in a dangerous place, when the employee, through inexperience or general incapacity, does not comprehend the dangers, and this inexperience or general incapacity is known to the master, or by the exercise of reasonable diligence could be known, to point out to the servant the dangers incident to the employment, and thus enable him to comprehend, and so avoid them. A neglect to discharge such duty renders the master liable for such injuries as the servant may sustain through the failure of the master to so instruct and advise. And it is for you to say, after weighing all the evidence in the case, whether the operation of the hoisting engine in question, in the manner in which it was operated, and the circumstances connected with its operation, was hazardous and dangerous, so as to have required the defendant to have instructed Kovec, and whether or not the plaintiff was inexperienced and lacking in capacity. "The contention is also made by the plaintiff that the defendant company was negligent in not providing a suitable cover or shield for the gearing into which his hand fell. As I have explained to you, the master is required to exercise reasonable care in providing a reasonably safe place for the servant to work, and reasonably safe appliances and machinery with which to work, and if the master proves negligent in that duty, and the servant is injured on account thereof, he is entitled to recover for such injuries as he may sustain unless he was guilty of contributory negligence, or unless he assumed the risk from its use in the situation in which it was. As to whether he assumed the risk, it is proper for the jury to consider where the gearing was, and whether or not he was required to



come in contact with it in the ordinary operation of the machine.

"The defendant contends that the injury which Kovec received was brought about by his own contributory negligence. That is to say, that through his own neglect, he contributed directly to the injury which he received. Now, contributory negligence is an affirmative defense. The duty of the plaintiff is to make out a case of negligence against the defendant, and if the defendant comes into court and says that the plaintiff was guilty of contributory negligence, upon that defense the defendant assumes the burden. If you find, in considering all the evidence, that the plaintiff was guilty of contributory negligence in attempting to operate the machine in the manner in which he did, letting his foot slip, or if he missed the brake by reason of carelessness on his part, and thus contributed to the injury that he received, he can not recover. If you believe that the foreman ordered Kovec to operate the engine in question, but did not instruct him in the method of its operation, that order would not relieve the plaintiff from exercising the care and prudence that an ordinarily careful person would exercise under the circumstances, and if the plaintiff did not understand the operation of the engine, yet did not exercise the care that an ordinarily prudent man would have exercised, under the circumstances, but without knowing how to operate the engine, undertook to run it, and negligently and carelessly undertook to put his foot upon the brake, and by reason of his negligence in so doing, fell or was thrown into the gearing of the machine, and that his negligence in attempting to operate the engine and in attempting to put his foot upon the brake, was the proximate cause of the injury he received, then the plaintiff is not entitled to recover. That is to say, gentlemen, it comes back to the proposition that the duty of the servant is a correlative one. He must exercise care to avoid injury to himself. He is under as great obligation to provide for his own safety from such dangers as are known to him, or as are discernible by ordinary care on his part, as the master is to provide for him. A man can not go blindly into a terrible danger, and, if he is

injured, hold his employer, but whether he does go blindly into it is a question of fact. Now, consider whether or not Kovec was told to operate that engine; consider the engine; consider the brake; the gearing was exposed; there is no question about that. But it seems to me that you will find the more material matter in the case to be the question of the operation of the machine by the brake. Consider whether the plaintiff acted as a man of ordinary prudence would have acted; whether or not, when he saw the exposed gearing, he acted as a man of ordinary prudence and care would not have acted. Those are questions to be arrived at by a fair consideration of all the evidence there is in the case. You may believe that the plaintiff was not employed to do the work in which he was engaged at the time of the injury, yet if you believe that he engaged in the work without objection, and that the risks and dangers thereof were open and patent to his sight and understanding, then he occupies the same position he would have occupied if he had been originally employed to run the engine, and if he was injured by reason of such open and patent risk, if there was any such,—his injury was the result of risks which were assumed by him, and he is not entitled to recover.”

It is preposterous to claim that the defendant in error was a volunteer. He was directed to run the engine and his refusal to do so meant, as he believed, his dismissal.

Transcript, pages 36, 46, 49.

We respectfully submit that the judgment should be affirmed.

MILLER & O'CONNOR and  
WALSH & NOLAN,

*Attorneys for Defendants in Error.*

100-111-111



39 Mont. 571.  
104 Pac. 679.

520

IN THE

# Supreme Court

OF THE

STATE OF MONTANA

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CLIFFORD GORDON,

*Respondent,*

VS.

NORTHERN PACIFIC RAILWAY COMPANY,

a Corporation and A. B. ELLIS,

*Appellants.*

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APPELLANT'S BRIEF.

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STATEMENT.

Respondent herein was an employe of the appellant company and engaged in the work of looking after engines temporarily at Townsend, Montana, his duties requiring him to among other things, examine the water glass on the engine. This he alleges was liable to break and should be provided with a guard (T. 4, l. 3). He alleges his youth and inexperience (T. 5, l. 10) at the time he was injured and the failure of the defendants to warn him of the likelihood of the glass breaking (T. 5, l. 25). On

May 10, 1905, while engaged in his work he is injured by the water glass exploding, a fragment of glass striking his right eye, destroying the sight of the said eye and occasioning excruciating pain. (T. 6, l. 16.)

Appellant's answer admitted the employment and the accidental explosion of the glass resulting in some injury to his right eye, (T. 7, l. 8) but otherwise denied the allegations of the complaint. The defenses of assumption of risk and contributory negligence are set up in the answer and denied in the reply.

Respondent's evidence disclosed his age to be 27 years, and the fact that he had instructions from his father, who was engaged in similar employment to his own with the appellant company, as to the duties of his employment; (T. 23, l. 6) and also made a practice of inquiring as to the work (T. 23, l. 26—T. 28, l. 24). His knowledge was such, that he felt he could fairly offer himself for the job (T. 28, l. 27). His work was at night and beside looking after engine fires, cinders, etc.; he had to visually examine water glasses and see to the water therein. This glass is a tube about a foot long on the left side of the engine (T. 25, l. 29) being about the same in all engines; they all having some sort of a guard. He was handling from six to seven engines every night from May 1 to May 10 (T. 23, l. 30). Besides the engine here in question respondent testifies that there was one other engine

without a guard which he worked on every night (T. 28, l. 29).

As to the engine in question respondent first testified that it was without a guard. On cross examination he was shown his signed statement made to a claim agent shortly after the accident, which statement he was certain he had read over before signing (T. 31, l. 7—T. 32, l. 6) which in two places stated that there was a guard over the glass. We might add, however, that subsequently in the trial when plaintiff had been recalled to the stand, over the appellants' objection, he testified that when he signed the statement, he could hardly read (T. 39, l. 27).

On the night of May 10, 1905, the engine was brought in by defendant Ellis and turned over to the respondent. Subsequently, while looking at the glass it exploded and a fragment struck respondent's right eye. Over appellants' objection he was allowed to testify as to the subsequent condition of his left eye and its pain (T. 29, l. 19) and its keeping him from work.

Respondent's witness Stafford testified as to the general use of water glasses and their installation and the fact that the danger of breakage is ever present (T. 34, l. 13) and as to the substance of a rule requiring engineers to advise employees that the glasses were dangerous. (T. 34, l. 17—T. 36, l. 25—T. 37, l. 15).

Appellants' case disclosed by the testimony of the

witness Ellis (T. 41, l. 3-28—T. 44, l. 16—T. 45, l. 23—T. 46, l. 22) and the witness Harrison (T. 49, l. 13—T. 51, l. 6-7) that the water glass had a shield on it at the time of the accident and by the witness Burchett (T. 52, l. 22) and the statement of Andrew McDonough (T. 55) that the glass had had a shield for three months immediately prior to the time of the accident. The testimony also discloses that the absence of a shield and the liability of breaking of glass were matters of common knowledge which it was not necessary to warn watchmen about (T. 63, l. 16) also of the possibility of these glasses to break by the action of heat or cold (T. 42, l. 11—T. 57, l. 28—T. 62, l. 6). Appellant also offered in evidence respondent's original complaint, paragraph 8 thereof, to show that plaintiff did not at the time of the commencement of the suit claim that he was ignorant of the dangers of the breaking water glass (T. 56).

At the close of the case appellant moved the court for directed verdict (T. 66-67) which was overruled and the cause submitted to the jury who found a verdict in favor of the respondent in the sum of \$3000.00 (T. 20 l. 23) and from the judgment entered thereon and the order denying the motion for a new trial, these appeals are taken.



**SPECIFICATIONS OF ERROR RELIED UPON  
BY THE APPELLANT:**

**First:** The court erred in overruling defendant's motion for a new trial.

(T. 22 and 79, l. 20)

**Second:** The court erred in overruling the appellants' motion for a directed verdict.

(T. p. 67; l. 11.)

**Third:** The court erred in allowing the following question to be asked of the respondent:

"Q. And you said something a short time ago about the condition of the other eye. What did you say as to that ?

"Defendants object on the ground that there is no allegation in the pleading to warrant such inquiry and that the damage must be limited to loss of the right eye.

"Objection overruled. Exception noted.

"(And it was understood that the objection and exception should stand as to any other testimony concerning the left eye.)

"A. The eye is not as strong as it used to be."

(Tr. p. 26; l. 19.)

**Fourth:** The court erred in allowing other testimony with reference to the condition of the left eye, and in refusing to strike out the testimony with reference to the respondent not being able to work by reason of the condition of his left eye.

"Q. And how as to suffering or experiencing any pain in that left eye ?

"Defendants object for the same reason.

"Objection overruled. Exception.

"A. It never pains particularly, only if I read a little why my eyes begin to water.

"For a year I never did anything. Then I drove delivery wagon here in town and worked on the ranches.

Fifth: The court erred in refusing to strike out the testimony with reference to plaintiff's ability to work, said testimony being as follows:

"Q. And speaking about the time that elapsed, why was it that you did not go to work that year.

"A. Because my eye (left) was so weak I could not stand any bright light.

"Defendants move to strike out the answer because not within any averment of the complaint as to loss of work.

"The court denied the motion and defendants excepted."

(Tr. p. 27; l. 1.)

Sixth: The court erred in overruling appellants' objection to the following question and allowing answer thereto:

"Q. And what do you say as to the rule on the Northern Pacific railroad, during the time you were engineer, take for instance as to a danger of this kind, a danger resulting from the absence of a guard, and from the breaking of the glass, being such a danger that the engineer advises anybody about?

"MR. WALLACE: We object to this question on the ground that it calls for a rule; in other words a custom or habit, to impose a responsibility on engineers during the period when the witness was connected with the Northern Pacific. First, it is immaterial; second, there is no pleading of any duty by custom in this regard, nor is there any direct pleading of any duty by custom in this regard, nor is there any direct pleading of any

"duty at all, the only affirmation being that  
"the engineer negligently and carelessly did  
"not warn plaintiff. For this reason it is not  
"only immaterial, but incompetent.

"Objection overruled. Exception.

"A. There are such instructions by the management that the glasses are dangerous.

"MR. WALLACE: Are those instructions  
"in writing?

"A. Yes, sir.

"MR. WALLACE: We move to strike it out  
"on the ground that the directions is the best  
"evidence.

"Motion denied.

"Exception.

"WITNESS: There are such instructions  
"to the engineers, to report such things as  
"water glass guards off.

(Tr. pp. 34, l. 16—35, l. 1.)

Seventh: The court erred in allowing the following question to be asked of the respondent and his answer to be admitted in evidence:

"Q. And did their condition at that time  
"make reading a pleasure to you or painful  
"when reading.

"Defendants object as leading and irrelevant. This witness before recess and before  
"having any opportunity to discuss the matter  
"with his counsel stated in answer to a direct  
"question that he read these papers over before  
"he signed, and I submit the question is  
"improper in this form.

"Objection overruled and defendant's except.

"A. I could hardly read a letter that I received from my folks. I was forbidden to  
"read more than I positively had to."

(Tr. 39, l. 27.)

Eighth: The court erred in giving to the jury plaintiff's offered instruction No. 3 (No. 13 of the Court's Charge), which reads as follows:

"You are instructed that when a servant engages in a particular employment he is presumed to do so with a knowledge of and a taking of the risk of its ordinary hazards, but only those, and is justified in assuming that the employer will exercise reasonable care to furnish him reasonably safe agencies and appliances with which and through which the work may be done, and he does not assume the risk that that the master will be neglectful in the duty towards him of exercising reasonable care in providing reasonably safe appliances, and he may rest secure in the assurance that this duty will be performed by the master, and in this case the law imposing the duty upon the defendant railway company to exercise reasonable care in providing a reasonably safe water glass reasonably secure in its equipment, so as to prevent danger resulting from its accidental breaking, the plaintiff on the night in question when he sustained the injury was justified in assuming that the water glass in the condition in which it was was reasonably safe, unless as a reasonable man he knew, or ought to have known otherwise, and if without fault on his part he sustained injuries from the glass breaking through the absence of a guard and the defendant railway company in the exercise of reasonable care should have provided a guard then the plaintiff would be entitled to recover from the defendant railway company such sum as would compensate him for the injury sustained by him through the breaking of the glass."

(Tr. pp. 67, 68, 16 and 17.)

Ninth: The court erred in giving to the jury plaintiff's offered instruction No. 4 (No. 14 of the Court's Charge), which reads as follows:

"The plaintiff likewise claims that he was unfamiliar with the dangers incident to the use of the water glass in question in the condi-

"tion in which it was at the time he sustained  
"the injury, and that the defendants knew this  
"fact or by the exercise of reasonable diligence  
"could have known it. You are instructed  
"that the duty devolved upon the defendants to  
"advise the plaintiff of the danger attendant  
"upon the use of the glass in the manner in  
"which it was equipped on the night in ques-  
"tion if you find it was without a guard and  
"the defendants knew that fact or by the exer-  
"cise of reasonable diligence could have known  
"it and if you find from the evidence that such  
"danger existed and that the plaintiff was ig-  
"norant of it and it was such a danger or risk  
"as he did not incur in the ordinary course of  
"his employment, and if the defendants know-  
"ing this danger and likewise knowing that the  
"plaintiff did not know it, neglected to advise  
"him of its existence and through such neglect-  
"ful failure on the part of the defendants to so  
"advise him he sustained injuries complained  
"of, the defendants would then be responsible  
"in damages for the injuries sustained under  
"the circumstances as stated."

(Tr. pp. 68, 69, 18.)

Tenth: The court erred in giving to the jury plaintiff's offered instruction No. 5 (No. 15 of the Court's Charge), which reads as follows:

"The plaintiff is required to show by a pre-  
"ponderance of the evidence that the defend-  
"ants, or either of them, against whom he seeks  
"to obtain damages were neglectful, and by a  
"preponderance of the evidence is meant the  
"greater weight of it. The defendants al-  
"leging that the injuries sustained by the plain-  
"tiff was due to a risk incident to his employ-  
"ment, or was due to his contributing fault and  
"negligence are required to establish these de-  
"fenses or either of them by a preponderance  
"of the evidence and the burden is upon them  
"to do this."

(Tr. pp. 69, 18 and 19.)

Eleventh: The court erred in giving the jury plaintiff's offered instruction No. 6, (No. 16 of the Court's Charge), which reads as follows:

"If you find for the plaintiff you may assess  
"the amount of his damages at such sum as  
"under the proof you believe he is fairly en-  
"titled to receive, not exceeding the sum of  
"\$15,000.00, and in estimating the amount you  
"may take into consideration the injury that he  
"has sustained the pain and suffering that he  
"has endured, the deformity, if any, which ex-  
"ists by reason of the injury that he sustained  
"and the loss on account of inability to work,  
"through the receipt of the injury if you find  
"that such a loss arose. The law specifies no  
"particular method by which you can deter-  
"mine the amount that the plaintiff is entitled  
"to on account of the pain and suffering that  
"he endured, if you find that he has endured  
"any, or on account of the loss of his eye, if the  
"fact is that he has lost the use of his eye; or,  
"on account of any deformity which may exist  
"through the existence of the injury to his eye,  
"but you are to be governed in that respect by  
"the fact that the compensation to be awarded  
"to the plaintiff if he is to receive any at all  
"is intended to cover the loss actually sus-  
"tained by him in the particulars referred to.  
(Tr. pp. 69, 19 and 20.)

Twelfth: The court erred in refusing to give the jury defendants' offered instruction No. 5, reading as follows:

"5. Again, if this accident might have hap-  
"pened from flying particles of glass, with a  
"guard upon the water glass, whether properly  
"or improperly placed, then because the plain-  
"tiff can not recover for an improperly placed  
"guard under the pleadings in this action, but  
"only for the lack of a guard, he could not re-  
"cover at all. That is to say, he must show,  
"not only that there was no guard, but also that

"the presence of a guard would have prevented  
 "the injury. So if you find from the evidence  
 "that the guard was improperly placed, small  
 "particles of glass might have escaped through  
 "the openings, or one of the openings, and  
 "caused the injury to plaintiff, then even  
 "though you further find that there was no  
 "guard there in fact, you would have to re-  
 "turn a verdict for the defendants, because the  
 "law will not permit you to speculate on  
 "whether the accident would or would not have  
 "happened had the guard been there though  
 "improperly placed."

(Tr. p. 70.)

Thirteenth: The court erred in refusing to give  
 the defendants' offered instruction No. 6, reading as  
 follows:

"Even if you find by a preponderance of the  
 "evidence that there was no guard in fact on  
 "the water glass at the time of the accident,  
 "and even though you find that though had  
 "there been a guard, however placed, whether  
 "properly or improperly, the accident could not  
 "have occurred, this alone does not entitle  
 "plaintiff to recover, but in addition you must  
 "further find from the evidence that the de-  
 "fendants were at fault in not having a guard  
 "there at the time of the accident. Before you  
 "could find them so in fault for not having a  
 "guard there, plaintiff must have proven by a  
 "preponderance of the evidence either (1st)  
 "that there never was a guard upon the water  
 "glass of this engine or (2nd) that such a time  
 "had elapsed since the guard was last on the  
 "engine as that in the exercise of reasonable  
 "care the guard might have been or should  
 "have been replaced."

(Tr. pp. 70 and 71.)

Fourteenth: The court erred in refusing to give  
 the defendants' offered instruction No. 7, reading  
 as follows:

"There has been no attempt in this case to prove the first of these propositions, and so you could not find the defendant at fault on the theory that there never was a guard on the water glass of this engine. As to the second of these propositions I instruct you that there is no absolute duty on the part of either the engineer or the railway to keep this guard upon the water glass at all times. Its duty is only to use reasonable care. So, if the evidence leaves it uncertain as to when this guard was lost or removed from its place on the water glass of this engine, if you find there was no guard there at the time of the accident and unless it further shows that it had been removed so long as that it might and ought to have been replaced, then there would have been no fault on the part of either defendant growing out of the absence of this guard at the time of the accident and plaintiff could not recover."

(Tr. p. 71 and 72.)

**Fifteenth:** The court erred in refusing to give the defendants' offered instruction No. 8, reading as follows:

"In determining whether so long a time had elapsed as that the guard ought to have been, with the exercise of reasonable care, have been put back upon the water glass, you may consider where the proof shows the guard was first missing, and what facilities there were in the ordinary and usual operation of the railway to get these guards, and at what points they could be procured, and if the arrangements in that regard for procurement seem reasonable, or rather, if they are not proven to be unreasonable, and no opportunity had yet arisen to have procured and replaced the guard, then no fault can be found against either defendant for not replacing it, and your verdict should be for the defendants."

(Tr. pp. 72 and 73.)



Sixteenth: The court erred in refusing to give the defendants' offered instruction No. 9, reading as follows:

"I instruct you that under the proofs in this case the plaintiff has failed to furnish sufficient evidence to show that there was any unreasonable delay in restoring this guard to this water glass, or that there was any fault on the part of either defendant in not having a guard on the water glass at the time of this accident and that therefore there can be no recovery on the ground of the want of such water glass guard."

(Tr. pp. 73 and 74.)

Seventeenth: The court erred in refusing to give the defendants' offered instruction No. 10, reading as follows:

"The only other remaining ground of recovery is that the engineer negligently failed to warn the plaintiff that there was not any guard on the water glass. Of course if you determine that there was such a guard, then you will not consider this ground of recovery. If you should find that there was not such a guard, then I instruct you that there is no obligation on the part of the Master (in this case the railroad company) or of any other servant to warn any servant of what are called patent defects, and I advise you that the absence of this guard, aside from the danger arising from the likelihood of the water glass breaking, is a patent defect, because it could not be seen instantly as readily by the engine watchman as by anyone else."

(Tr. p. 74.)

Eighteenth: The court erred in refusing to give the defendants' offered instruction No. 11, reading as follows:

**"As to the danger arising from the breaking of the glass, I instruct you that as it was apt to break at any moments, under the testimony, a warning in this regard would be of no benefit to the plaintiff, and therefore no warning thereof was necessary as it could not have prevented the breaking of the glass or have enabled plaintiff to have taken any precautions against it."**

**(Tr. pp. 74 and 75.)**

**Nineteenth: The court erred in refusing to give the defendants' offered instruction No. 13, reading as follows:**

**"Statements made by a party against his own interests are to be most strongly construed against him; and accordingly if you believe from the evidence that plaintiff did make the statement contained in his written statement over his signature, then that statement should be given more weight by you than his statement made at this time that there was no water glass guard on this water glass."**

**(Tr. p. 75.)**

**Twentieth: The court erred in refusing to give the defendants' offered instruction No. 16, reading as follows:**

**"On the question of the breaking of the water glass and cause for same, I instruct you that if you believe from the evidence that the bursting of the glass was caused by the windows of the engine cab being open and letting cold air in upon the water glass and that this condition of open windows was brought about by some person or persons after the engine was turned over to the plaintiff as engine watcher, then regardless of whether that condition was caused by the plaintiff or by some other person there can be**

"no recovery as against these defendants upon  
"the ground."

(Tr. p. 76.)

### ARGUMENT.

The errors which we wish to present first to the court's attention in this case are those covered by assignments numbered third and fourth and relate to the introduction of testimony. Appellant contends that the admission in evidence of testimony concerning the condition of plaintiff's left eye, the pain and suffering therefrom and the effect of the left eyes impairment upon his ability to work was error. The complaint is specific upon its claim for damages and the specification of the injuries and contains no general allegation with reference to general bodily injuries and suffering or other impairment. The paragraph of the complaint involved herein reads as follows:

"\* \* \* glass flying at random struck the  
"right eye of the plaintiff inflicting injuries  
"thereon which resulted in the complete de-  
"struction of the sight of said eye and which  
"injuries occasioned excruciating pain all to  
"his damage in the sum of \* \* \*"

(T. 6, l. 16.)

The allegations of the complaint are noticeable for their absence of any claim for anything other than the injury to the right eye occasioned by the loss of sight therein and the pain attendant thereto. There is no general or broad allegation with

reference to general suffering or the possibility of other disabilities under which proof of injuries other than those specified has been allowed in some courts in particular instances. There is no allegation about the left eye or its impairment or pain or his impaired earning capacity by reason of consequential injuries or injuries to the left eye, yet when the complaint was specific and these allegations referred to were absent the court permitted testimony to be given before the jury which must of necessity influenced their verdict, testimony of injuries other than those alleged and under the pleadings here it was evidence which the jury were not entitled to consider.

The rule has long been established that it is unnecessary for the complaint to describe in detail all the circumstances and consequences of injuries or wounds sustained and extreme particularity is not required. This has its basis first in common knowledge because it is known and to be expected that certain circumstances will produce certain injuries and that certain injuries must of necessity produce suffering and certain permanent results. Secondly it is based upon principles of sound reasoning in that where it is known that from a given premises certain conclusions come the opposing party cannot be assisted by particularizing nor does anything of this kind stated generally take him by surprise. Further it is frequently true that the conditions of an injury or its extent or consequence

cannot be given with accuracy. This gives rise to the rule that where general allegations are made testimony of specific injuries or results will be allowed, yet even with these exceptions to the specifying of allegations required in law, there can be no doubt that the allegations should be of such a character as to fully and fairly acquaint the defendant with the nature of the testimony upon which plaintiff intends to rely. This general rule of pleading has been followed where questions of injuries and the proof was involved as in the case at bar.

Ry. v. Hammer, (Ky.), 60 S. W. 375.  
City v. McCullough, (Tex.), 95 S. W., 1121.  
Joliet v. Johnson, (Ill.), 52 N. E., 498.  
Cronin v. St. Ry. Co., 81 N. Y. S., 752.  
Hess v. St. Ry. Co., 57 N. Y. S., 222.  
So. Pac. Ry. Co. v. Martin, (Tex.), 83 S. W., 675.  
Thompson v. Ry., (Mo. App.), 86 S. W., 465.  
Maynard v. R. R. Co., (Or.), 72 Pac. 590.  
Dittman v. Light Co., 87 N. Y., App. Div. 68.

The last cited case being exactly like the one here involved even to the right and left eyes being what is under discussion.

A general allegation of damage will, as a rule, suffice to let in proof and to warrant recovery of all such damages as may naturally and necessarily result or be expected to result from the wrong complained of; the law implies such damages and it is only necessary to submit proof as to the extent and amount. But where as in the case here, it cannot be said that the damages actually sustained necessarily result from the act complained of, and are

therefore not implied by law, the plaintiff must state in his complaint the damage he sustained for notice to defendant, and if he fails to so state proof thereof will not be permitted in evidence upon the trial.

3 Sutherland on Dam. 426.

2 Sedgwick on Dam. 606.

Tex. etc. Ry. v. Curry, 64 Tex. 87.

Campbell v. Cook, (Tex.), 26 S. W. 486.

The rule just cited is especially applicable to this case because here plaintiff has particularized, and "while it may be sufficient to specify the main fact, yet if it is attempted to particularize the injuries arising from the principal one all that it is designed to prove should be alleged."

16 Enc. of Pl. & Pr. 380.

Putney v. Berry, 61 Mo. 365.

Int. Ry. v. Beasley (Tex. App.), 29 S. W. 1121.

So. Ry. v. Martin, (Tex.), 83 S. W., 675.

Further, when a pleader particularizes he denies himself the implications given by law and his specifying his damages is taken by the defendant as a bill of particulars and defendant is not expected to anticipate proof on something not alleged, nor will it be admissible.

Allegation as to leg,—proof of foot inadmissible.

Ry. vs. Beasley, (Supra).

Allegation as to back,—proof of leg inadmissible.

O'Conner vs. Prendergrast, 98 Ill. App. 531.

**Allegation of injury to spine,—proof as to breast injury inadmissible.**

**Fuller v. City (Mich.), 52 N. W. 1075.**

**Allegation as to face,—proof of functionary trouble inadmissible.**

**Thompson v. Ry., Supra.**

**Allegation as to spine and nerve injury,—proof as to injury to eyes inadmissible.**

**Express Co. v. Boyle (Tex.), 87 S. W. 164.**

**Allegation of back injury,—proof as to loss of sexual power inadmissible.**

**Jones v. Ry., 71 N. Y. S. 647.**

**Page v. Canal Co., 78 N. Y. S. 454.**

**Allegation of sprain,—proof kidney trouble inadmissible.**

**Ry. v. Rogers (Tex.), 53 S. W. 366.**

**Allegation of right eye,—proof of left eye inadmissible.**

**Dittman v. Light Co. (Supra).**

Nor can it be said that proof of an injury to one of two organs implies as a natural and probable consequence that the other is injured or permanently impaired in its functions. On the contrary common experience tells us that such is not the case. Frequently one ear is more acute, because of the loss of the other; one hand more dexterious when the other is maimed or absent. And no one expects the right foot to hurt because the left one is

cut off. So in this case it cannot be said that the probable and natural consequence of the loss of plaintiff's right eye will be pain and suffering in the left one. Where the injuries sought to be shown are not to be expected as the natural and probable consequences of injury complained of they cannot be proven unless complained of.

Express Co. v. Boyle, (Supra).

St. Ry. Co. v. Cotton, 41 Ill. App. 311.

Wilkinson v. Steel Works (Mich.), 41 N. W. 490.

What we have just said with reference to the allegations and proof as to the left eye applies equally as strongly to the denial of the motion to strike urged in the fifth assignment. There is nothing whatever in this complaint which advises defendants that there will be proof offered as to his diminished power to work, or his losing any work or position by reason of his left eye, or both his eyes. This being true he was not entitled to submit proof upon it. It is special damages and should therefore, in the absence of any general allegation, be specifically pleaded before proof is admissible, and the court erred in allowing the testimony to stand.

Mo. Ry. Co. v. Dawson (Mo.), 29 S. W. 1106.

Zongken v. Mtc. Co. (Mo.), 86 S. W. 486.

Fitchburg v. Donnelly, 87 Fed. 135.

Todwick v. Taylor (Tex.), 87 S. W. 358.

Kruger v. Ry. (Mo.), 68 S. W. 220.

Finken v. Brass Co. (Conn.), 47 Atl. 670.

Instruction number 13 is complained of because it allows the jury to generally consider the respon-



sibility of a master who uses a water glass. In other words, this instruction charges the jury that they may consider any question affecting the general safety of water glasses,—their size, location, use, etc., as well as their guards. The issues in the case were framed upon the proposition of a glass without a guard. The jury should not be allowed to go beyond this in their considerations. Yet this instruction not only allows them to speculate as to the general use, construction and maintenance of water glasses, but instructs them that in this case the issues are not confined to lack of guards, it says, “ \* \* \* the duty \* \* \* to exercise reasonable care in providing a reasonably safe water glass reasonably secure in its equipment, etc.” Then in the last eleven lines it suffers the jury, if they determined that by reason of the likelihood of the glass to break, it was not in a reasonably safe condition even though a guard was properly in place thereon to find direct for the plaintiff. This instruction was not warranted by the pleadings, and further it amounts to almost a peremptory instruction to the jury to find for the plaintiff if they find the glass broke. This we submit was error.

Instruction number 14 was erroneous because not warranted by the evidence. There was no proof whatever that the defendants knew or should have known of plaintiff's lack of familiarity with the danger of breaking glass. The evidence and law

applicable shows the contrary. He is not a young man, was always inquiring about engines and studying them, and had had some experience. Further his offering himself and taking the job was an implied statement of his qualification therefor.

Instruction number 15 is complained of because of its confusing the burden of proof. The instruction would give the impression that simply because the defenses of contributory negligence and assumption of risk were set up the burden of proof shifted and the defendant held the affirmative of the issue and was compelled to first prove its defense.

Sullivan v. Ins. Co., 35 Mont. 1.

Anderson v. Ry., 34 Mont. 181.

Keilleronner v. Floyd, 17 Mont. 307.

Kelly v. Cable Co., 7 Mont. 77.

Instruction number 16 we urge was erroneous because it allows the jury to consider testimony they should not. By this instruction the jury are to consider the "injury he sustained," within this would, of course, be included the pain and suffering and impaired sight in the left eye. This testimony as we have heretofore urged was improper, and it was improper for the jury to consider in their deliberations any pain or injury other than that alleged, to-wit, that in the right eye.

Yoder v. Reynolds, 28 Mont. 183.

Bank v. Carrol, 35 Mont. 302.

Walsh v. Mueller, 16 Mont. 188.

Pustle v. Casey, 11 Mont. 229.

Kinna v. Horn, 1 Mont. 332.

Howe v. Brewery Co., 35 Mont. 264.

**Brownell v. McCormick, 7 Mont. 12.**  
**Goodkind v. Gilliam, 19 Mont. 385.**

The instructions complained of were for the reasons stated erroneous and from a reading of them it is quite apparent that the jury would be influenced by them to the prejudice of defendants. Their verdict so indicates. Further more, error is presumed from an erroneous instruction.

**Smith v. Perham, 33 Mont. 309.**  
**Martin v. City, 34 Mont. 281.**

As to instructions numbered 6, 7 and 8, offered by the defendants and refused by the court, error is predicated because they fully and correctly state the law as raised by the issues and were not given. Defendants are entitled to have instructions which are correct, applicable and within the issues submitted. Had these three instructions been given the error complained of in instruction number 13 would have to some extent been cured. There can be no dispute upon the proposition that the master cannot be held in this case to a higher degree of care than reasonable care and to charge him with the duty of knowing of a defect and repairing it when no opportunity for so doing has been presented is beyond the meaning of reasonable care and a greater responsibility than the law imposes. Court's charge 13 would place upon the master such higher duty and aside from the fact that defendants were entitled to these instructions irrespective of the court's charge, the fact that it was given but

emphasizes the error of the court's refusal of these.

Instruction number 9, defendant was entitled to because there had been a complete failure of proof in this regard and the testimony of witnesses Ellis (T. 41, l. 13), Harrison, (T. 49, l. 13), Burchett (T. 52, l. 28), and McDonough (T. 55, l. 8).

Prejudice must certainly be found from the refusal of the court to give instruction number 13. Early in the trial the plaintiff testified twice that he was very sure he had read the statement over (T. 31, l. 7; T. 32, l. 6), now after he has had an opportunity to become advised as to the effect of his testimony and in response to both improper cross examination and improper form of question he is permitted to practically impeach his own testimony. Defendants objected, did all they could to shut out the testimony, but it was received. Defendants by this instruction attempt, as they had a perfect right to do, to instruct the jury as to the force of his statement and as far as possible correct the error in the minds of the jury made by the testimony, and still the court refused it. We do not feel that this Court will give even countenance, much less affirmance, to such action in view of the character of the testimony and the circumstances under which it was given.

The errors to which we have already called the Court's attention to some extent cover the grounds of the motion to direct the verdict, however we

would again urge some of the positions brought out by the motion.

The questions with reference to the failure to warn or to have guarded must be resolved against the plaintiff. He is a young man 27 years of age. No showing is made as to any impairment of his senses or faculties, and he will be presumed to have full use of them. He has been around engines before and on the particular job has handled seventy or more engines equipped with water glasses. He knows their action and their purpose. Now a man of his age and experience comes forward and says he needed a warning. Aside from the fact that there is no proof that a warning would or could have prevented the accident and therefore not sufficient proof, we do not believe he was entitled to a warning because the danger was patent.

A man of ordinary intelligence, and there is no proof that he was other than such, is charged as a matter of law with a knowledge of well known natural laws, such as the action of cold, gravity, leverage, water, slippery surfaces, etc., without a warning or any special experience.

Jones v. Ry. (Ky.), 26 S. W. 590.

Powers v. Ry., 98 N. W. 274.

Ry. v. Smith, 9 Lea 685.

Eng. v. Ry. Co., 24 Fed. 910.

Shea v. Ice Co., 76 Mo. App. 29.

Bohn v. Ry. (Mo.), 17 S. W. 580.

Yazoo Co. v. Smith, (Miss.), 28 So. 807.

Olson v. McMullen (Minn.), 24 N. W. 318.

Romona v. Stone Co. (Ill.), 39 N. E. 529.

1 LaBatt M. & S., p. 1045.

The law cannot allow speculation influenced by prejudice or sympathy, to say that men do not know matters of common knowledge. It is known that glass is fragile, that it cannot be expected to stand the pressure which the surroundings show it takes heavy iron and steel to withstand. It is also a matter of common knowledge how the common lamp chimney or tumbler break under the influence of heat or cold. Plaintiff cannot be heard to say he didn't know this property of glass when a minor has been held to the knowledge of the action of gas on bottles.

Omaha Botl. Co. v. Theiler (Neb.), 80 N. W. 821.

or a stake in a new use thereof in staking cars.

Walto v. Hart (Wash.), 34 Pac. 423.

Under the evidence and the law as applied to the facts here admitted the plaintiff knew the danger, and by continuing to work with this engine and the other one which he says had no guard, he agreed to continue to work and his contract to assume the risk was created. It seems to us some definite guides should be established as to just when the contractual relation of assumption of risk is established. It is well known that a contract must be definite and when we have a definite knowledge it seems to us the contract is created. Hence when we have a situation which is patent or of common knowledge and the servant works in it on May 1st or any other day, then returns and works with it

on May the 10th, he impliedly said when he returned to work, I agree to your offer, your pay, and your dangers.

We further submit that there is absolutely no proof in this case that the master knew of the absence of the guard, if there was such absence, a sufficient time to have placed thereon a new guard, nor is there any showing of a duty resting upon the master to carry such repairs on the road, or have them at Townsend.

We respectfully submit that this case clearly shows serious error which if allowed to stand will obliterate some of the most well known guide posts of the law and the order denying the motion for a new trial and judgment should be reversed.

Respectfully submitted,

WM. WALLACE, JR.,

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R. F. GAINES,

*Attorneys for Appellant.*





39 Mont. 571.  
104 Pac. 679.

IN THE  
**Supreme Court**  
OF THE  
**STATE OF MONTANA**

---

CLIFFORD GORDON,

*Respondent,*

vs.

NORTHERN PACIFIC RAILWAY COMPANY,

a Corporation, and A. B. ELLIS,

*Appellants.*

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**BRIEF OF RESPONDENT.**

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In the complaint it is alleged that the respondent was in the employ of the appellant company as an engine watcher at Townsend, on the 10th day of May, 1905, and at the time there was stationed there a locomotive engine in the immediate charge of A. B. Ellis, one of the defendants. That there was on the engine a water glass, which was liable to break, and in order to prevent injury in case it should break, it should have been equipped with a guard. That it was Ellis' duty to obtain and install a guard, when, if for any reason, one was miss-

ing. That the respondent in the performance of his duty was required to examine this water glass to ascertain if the engine had a sufficient supply of water, and that on the date named, and for many days prior thereto, the water glass on the engine in question was without a guard, and that the defendant Ellis negligently failed to procure one, and that he and the company operated the engine without a guard for the water glass.

That at the time the respondent entered the employ of the appellant company, ten days before the date of the accident, he was inexperienced and was unfamiliar with the danger attendant upon the use of such glass, and had no knowledge that it was likely to break, and that the appellants knew this, or, in the exercise of reasonable diligence, should have known it, and he was permitted to continue his employment without being advised in any manner of the dangers to which he was exposed on account of the accidental breaking of the glass.

That on the 10th day of May, while examining the glass for the purpose of ascertaining whether the engine needed water, the glass exploded and fragments of the glass struck his right eye, destroying completely the sight, and causing excruciating pain, all to his damage in the sum of fifteen thousand dollars.

Complaint, transcript, pages 2-6.

Respondent, upon the trial, testified as follows:

"I had as good eyes as any one before the injury.

Q. And you said something a short time ago about the condition of the other eye. What did you say as to that?

Defendants object on the ground that there is no allegation in the pleading to warrant such inquiry and that the damage must be limited to the loss of the right eye.

Objection overruled. Exception noted.

A. The eye is not as strong as it used to be.

Q. And how as to suffering or experiencing any pain in that left eye?

Defendants object for the same reason.

Objection overruled. Exception.

A. It never pains particularly, only if I read a little, why my eyes begin to water. For a year I never did anything. Then I drove delivery wagon here in town and worked on the ranches.

Q. And speaking about the time that elapsed, why was it that you did not go to work that year?

A. Because my eye (left) was so weak I could not stand any bright light.

Defendants move to strike out the answer because not within any averment of the complaint as to loss of work.

The court denied the motion and defendants excepted."

On admission of this evidence two errors are predicated.

(a) It is claimed that under the allegations of the complaint no evidence whatever should be permitted as to the condition of the left eye.

(b) That evidence as to impaired earning capacity could not be considered as an element of damage.

I. EVIDENCE AS TO CONDITION OF LEFT EYE.

The rule generally recognized is stated as follows:

**"All damages that necessarily flow from the injury complained of may be recovered without special averments, but such as are merely the natural or proximate, but not the necessary result must be specially averred."**

Current Law, Vol. V, page 932.

The difficulty in the present case arises from the application of this principle to the facts before us.

We are concerned with the injury to the right eye, and to determine the extent of that injury, in so far as the visual powers of the respondent are concerned, the condition and state of the uninjured eye are directly involved.

If the left eye is affected at all it is affected as an incident of the injury done to the right eye, and it is, therefore, proper to inquire whether or not the visual powers of the respondent are in any manner impaired by the complete destruction of one eye.

Reasonable liberality is alleged by the courts in matters of this kind in the extent to which proof is admitted showing the consequences of the injury. The rule succinctly stated seems to be as follows:

**"The sufficiency of the allegations of a complaint or declaration to admit proof of a particular injury or condition necessarily depends upon the language employed by the pleader, and while it is impossible to make any general statement respecting the subject, it may be said that the courts have usually been very liberal and inclined to sanction the admission of proof justified by the facts where it will have no misleading effect or work any injustice."**

Vol. 16 Pl. & Prac., p. 385.

Expressive of that principle the following cases have been selected from many.

An allegation that plaintiff was seriously and permanently injured is broad enough to admit proof of any bodily injury which resulted in impairment of hearing and sight.

Graham v. Jos. H. Bauland Co., 89 N. Y. Supp. 595.

An allegation of injuries to the head is broad enough to admit evidence that the injury received caused pressure of and injury to the brain.

Fleming v. Tuttle, 90 N. Y. Supp. 661.

Proof of uterine trouble is admissible under an averment that plaintiff became sick, sore and disabled.

Lofink v. Interborough Rapid Transit Co., 94 N. Y. Supp. 150.

Heart trouble and neuralgia may be shown under the averment of serious and lasting internal injury.

Rice v. Wallowa Co., 81 Pac. 358.

A general averment of bodily injury is sufficient to admit proof of particular injuries, objection being first made at the trial.

Wilbur v. S. W. Mo. Elec. R. Co., 85 S. W. 651.

An allegation of bodily injury is sustained by proof of injuries to hands and wrists.

City of Eureka v. Neville, 79 Pac. 162.

Under the allegation alleging injury to the arm,

the effect of such injury on the use of the hand may be shown, and under an averment of injury to the head and face, inability to use the mouth, and affectation of speech and inability to eat may be shown.

Comstock v. Georgetown Township, 100 N. W. 788.

Averment of injury to head and back, causing great pain and mental anguish and permanent injury to back, authorized proof of fainting and dizzy spells.

Hollingsworth v. Ft. Dodge, 101 N. W. 455 (Ia.)

An allegation that plaintiff was greatly bruised about the head and face and body, admits proof of injuries to the head and face and to sight and hearing.

Terre Haute v. Pritchard, 76 N. E. 1070.

Where the complaint alleged that the plaintiff was made sick by his injury, proof of the specific diseases which directly resulted from his injury was admissible without a more specific allegation thereof, and proof of the existence of pleurisy was held competent, though not alleged.

Lander v. Currier, 84 Pac. 217.

A declaration alleging that by reason of the injury plaintiff became sick, sore, lame and disabled is sufficient to warrant the admission of evidence to show that the plaintiff suffered from rheuma-

tism as a result of the injury, and that his hearing was impaired.

Chicago Gen. Ry. Co. v. King, 94 Ills. App. 277.

In pleading the character of the injury, it is not necessary to give a catalogue of every subordinate result following therefrom in order to introduce proof of such results.

Cudahy Packing Co. v. Broadbent, 79 Pac. 126.

Results of injuries may be proven, though only the injuries are set out in the pleading.

Snyder v. City of Albion, 71 N. W. 475 (Mich.)

The proposition now under consideration was fully discussed in the case of

Montgomery v. Lansing City Elec. Ry. Co., 61 N. W. 543 (Mich.),

when the following language of Mr. Justice Campbell was approvingly quoted:

“The battery consisted in striking McKee with a chair, whereby certain injuries were inflicted on his face and head, and in consequence of which he was seriously, and, as is claimed, permanently, affected. Among other results, there was evidence that he suffered from a urinary difficulty caused or aggravated by the blow. It was claimed this injury was not within the terms of the declaration, and could not be shown without express averment. If the evidence showed any such resulting injury, it shows it to have been as closely connected with the blow as any of the other evil consequences. It was a sickness produced by it in the same

way as the swelling and soreness in the head and eyes, and the other grievances about which no question was made on the trial. The declaration charges sickness and pain to have been among the sufferings caused by means of the assault, and we do not think the rules of pleading require any more specific description than was given. We need not inquire how far it was requisite to go in declaring for consequences not necessarily following such an injury, because these consequences are very clearly set forth. When the defendant was informed that damages were sought for sickness and disorder, and their attendant expenses, as well as for wounds and bruises, he was bound to expect evidence of any sickness the origin or aggravation of which could be traced to the act complained of,' and the court added: 'It will be seen that the rule thus laid down does not require plaintiff to aver all the physical injuries which he sustained, or which may have resulted or be aggravated, by the tort, even though they do not necessarily result from the original injury. If such injuries can be traced to the act complained of, and are such as would naturally follow from the injury, they need not be specifically averred.' "

In an action for injuries to a servant, evidence that his general health had been impaired by the injury, was properly admitted, though no such impairment had been alleged in the complaint.

Youngblood v. S. C. & G. R. Co., 38 S. E. 232.

Where it was alleged that the plaintiff had received a serious and painful wound in his left side, evidence of injury to the left kidney was admitted.

M. K. & T. R. Co. v. Edling, 45 So. 406.

The loss of a general prospect of marriage in the case of a child, by reason of an injury which dis-



figured her, is a natural consequence of the injury and may be taken into consideration as an element of general damages without a special allegation in regard to it.

**Smith v. Pittsburg & W. R. Co., 90 Fed. 783.**

Injury to eye-sight may be proved under a complaint alleging that the plaintiff was hurled forward with such force as to bruise her knee, wrench her arm and otherwise seriously and grievously injure her.

**Brooklyn Heights R. Co. v. Maclaury, 107 Fed. 644.**

Injuries to the back and spine and brain authorize damages for defective eye-sight where it is shown that the defective sight was the proximate result of the injuries to the back and spine pleaded, although there is nothing in the complaint about injuries to the eyes.

**West Chicago Street Ry. Co. v. Levey, 55 N. E. 554.**

An allegation in the complaint that plaintiff sustained bodily injuries is sufficient to admit evidence of injury to the eye-sight.

**Quirk v. Seigel, Cooper & Co., 60 N. Y. Supp. 228.**

Where the plaintiff alleged that he sustained serious and lasting bodily injuries to his head, limbs and nervous system, it was not error to admit testimony of impaired hearing and eye-sight.

**Mullady v. Brooklyn Heights R. Co., 72 N. Y. Supp. 911.**

Where plaintiff alleged that he was injured internally, about the head, and suffered severe pains, he may show that his eye has been affected since the accident.

Stunbridge v. So. Ry. Co., 43 S. E. 968.

Under a declaration in an action for personal injury, which describes the wounds received by plaintiff, evidence is admissible with respect to injuries not described, but which naturally resulted from such wounds.

Peltomaa v. Katahdin Pulp & Paper Co., 149  
Fed. 282.  
Affirmed 156 Fed. 342.

All damages that are the proximate and proper consequence of the act complained of may be recovered under a general allegation of damage.

M. K. & T. Ry. Co. v. Lightfoot, 106 S. W.  
395.

Where the complaint alleged injuries to the right leg so that it was knocked out of place, became injured and a great strain put upon the whole body, causing a lesion of the kidneys and other internal organs, evidence as to impairment of the eye-sight was held to be competent.

Bodie v. Charlestown & W. C. Ry., 39 S. E.  
715.

In the case of

Manley v. Delaware & H. Canal Co., 37 At.  
279 (Vt.)

the court said:

**"Testimony that as a result of plaintiff's injuries, she showed curvature of the spine and defective eye-sight, was objected to for that the declaration contains no allegation in respect to them, but if they resulted from the injuries specified in the declaration, they could well be shown, and if necessary to avoid a reversal of the case, we should assume that they did so result, as the contrary does not appear."**

**Physical suffering may be recovered for even though not specially alleged.**

**Louisville & N. P. Co. v. Dickey, 104 S. W. 329.**

**The complaint alleged that the plaintiff sustained a compound fracture of the skull, and that his arm, elbow, ankles, legs and back became and were cut and bruised and contused, and that on account thereof his physical and mental abilities have been and will remain impaired and lessened and destroyed. It was held that evidence proving impairment of the eye-sight was competent.**

**Rudoman v. Interurban Street Ry. Co., 98 N. Y. Supp. 506.**

**The Supreme Court of Nebraska in a recent case,**

**City of South Omaha v. Sutcliffe, 101 N. W. 998,**

**stated the rule as follows:**

**"In actions for personal injuries, it is not necessary to specially allege every injury to each part of the body to lay the foundation for such proof on the trial. Such evidence may be admitted when the injury alleged is shown to have been the natural and proximate cause of the injury proven."**

In the case of

Youngblood v. S. C. R. R. Co., *supra*, the

Supreme Court of South Carolina quoted with approval the following excerpts from the treatises referred to as follows:

“In 5 Encyclopedia of Pleading and Practice, 746, 747, under the head of “Describing Injuries”, it is said: “It is not necessary in such actions that the petition should undertake to give a specific catalogue of the plaintiff’s injuries. It is enough that the declaration shows the injury complained of, without describing it in all its seriousness, and a recovery should be had in proportion to the extent of the injury.” And we find the following on page 747: “Nor do the rules of pleading require that every effect or result following the infliction of particular injuries shall be set forth in the declaration in order to recover therefor, since such a course would, in effect, require the pleading of the entire evidence.” In 3 Sutherland on Damages, 2661, 2663, the rule is thus stated: “The general rule in tort is that the party who commits a trespass or other wrongful act is liable for all the direct injury resulting, although such injury could not have been contemplated as the probable result of the act done. The plaintiff may show specific direct results of the injury without specially alleging them, as that he was thereby made subject to fits. If they were a part of the result of the injury, the plaintiff may recover for such damages without specially alleging it, as well as the pain and disability which followed.””

These cases might be multiplied indefinitely. They are simply expressive of the rule heretofore stated, that damages that naturally or necessarily arise from a certain state of facts need not be spe-

cially pleaded, and the effect of the injury and the pain and suffering it will presumably cause may be shown without being expressly set forth.

The court takes judicial notice of the laws of nature,

Section 7888, Revised Codes,

and will take judicial notice of the fact that the destruction of the sight of one eye impairs the powers of vision, and that there is such a relationship between the eyes, that the destruction of the sight of one necessarily affects to some extent the use of the other.

The allegation, however, appears in the pleading in this case that on account of the injury, the respondent suffered excruciating pain. This averment is broad enough so that proof such as is here presented as to the other eye would be admissible.

But it is asserted with a good deal of confidence that the case of *Ditman v. Railway Company*, cited in appellant's brief, is a case in point, and against our contention. We do not read the case in that way. It was said in that case that there was no evidence to show that the injury to the left eye was the immediate and necessary result of the injury to the right eye.

Here we have the statement of the respondent that before the destruction of the sight of the right eye he had as good eyes as any one, but that after the injury there was a weakness of the left eye so

that he could not stand any bright light, and that the eye would ache when exposed to the sunlight. We have by this evidence clearly established the injurious consequences of the injury inflicted.

So far as we have been able to ascertain, and we have made a very thorough examination of the cases, there is only one case directly in point that we have encountered—the case of

Maitland v. Gilbert Paper Co., 72 N. W. 1124  
(Wis.)

There, as here, the injury was caused by the bursting of a water glass, and the allegation was that it suddenly burst, causing the glass, steam and hot water to strike plaintiff in his left eye and injuring it to such an extent as to destroy it.

It will be noticed that in that case there was wanting the allegation that the injury caused excruciating pain. The court said:

“Evidence was allowed under objection from defendant’s counsel respecting the effect on plaintiff’s right eye of the injury to the left eye. The complaint charged that the direct injury from the breaking of glass was to the left eye. We see no reason why evidence as to all the injuries to the plaintiff which flowed naturally from the destruction of the left eye were not competent. The objection to the evidence was properly overruled.”

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## II. EVIDENCE AS TO IMPAIRED EARNING CAPACITY.

To sustain this claim of error, counsel cites cases

from Missouri, Texas and Connecticut, and might likewise find cases equally in point from Kentucky. Beyond the states referred to, decisions sustaining this doctrine are few and far between. The rule is stated in

Cyc. Vol. 13, p. 187,

as follows :

“Where the injury alleged will necessarily render a person less capable to perform his usual business duties in the future, proof of the impairment of his general earning capacity may ordinarily be given under the general allegation of the injury, and damages resulting therefrom, such as the inability to attend to his ordinary business, without a special averment that plaintiff will be unable to earn as much in the future as in the past, or without specially averring the nature of his occupation or employment, although a few courts seem to require greater strictness and definiteness in the allegation,”

and the few courts to which the author refers find honorable mention in appellant's brief.

Sustaining the doctrine of the text, reference is made to decisions of nearly all of the states, and in the list is our own state. This court in the case of

Hamilton v. Great Falls, 17 Mont. 334,

holds conformably to the doctrine above announced.

See also :

El Paso S. W. R. Co. v. Barrett, 101 S. W. 1025.

City of Bloomington v. Chamberlain, 104 Ill. 268.

Chicago City Railway Co. v. Hastings, 26 N. E. 594.

Joslin v. Grand Rapids Ice Co., 15 N. W. 887.

Doherty v. Lord, 28 N. Y. Supp. 720.

Texas & P. Ry. Co. v. Bowlen, 32 S. W. 918.

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Instruction No. 13.—We respectfully submit that the instruction is not susceptible of the construction given to it by appellant. Complaint is made that the instruction permitted the jury, if they determined that by reason of the likelihood of the glass to break, it was not in a reasonably safe condition even though the guard was properly in place, to find for the plaintiff, and was a peremptory direction to the jury to find for plaintiff if they found the glass broke. Such a construction of the instruction is unwarranted. The language of the instruction is "if the plaintiff sustained injury from the glass breaking, through the absence of a guard, and the defendant company, in the exercise of reasonable care, should have provided a guard, then the plaintiff would be entitled to recover." The instruction is as clear as language can be. It directs the jury that recovery is possible only where the injury is sustained through the glass breaking through the absence of the guard. How it can be asserted that the jury, under the instruction given, were at liberty to find for the plaintiff upon finding that the glass broke, we are at a loss to comprehend. We assert, in the first place, that the in-



struction under consideration did not so direct, and, subjecting it to the most critical analysis, no inference such as is reached is justified.

Besides, in instructions numbers 5, 6 and 7 (court's numbers), transcript, pages 12-13, the jury were positively instructed that the breaking of the glass could not be made the basis of recovery, and that if the evidence was evenly divided as to whether there was a guard or not, a verdict should be found for the defendants.

Equally unmerited is the adverse comment upon instruction number 14. The evidence shows that the plaintiff was in the employ of the company only for the period of ten days before the night of the accident. He had had no experience with machinery of any kind. The company was not justified in assuming that he knew anything about machinery when he was employed, and the nature of the employment was such that knowledge of machinery was not requisite.

Mr. Morse, a locomotive engineer of many years' experience, and in behalf of the defendants, testified that a stranger might not notice anything wrong about the glass without a shield, but consolingly remarked that men like that are not supposed to be about machinery; that a man has to learn, and not knowing the business, and he wanted to get information and asked for it, the witness would furnish same; that he would indulge in the assumption that he had the information until he

asked for it. This witness likewise testified that the shield or guard was an effective preventive from breaking glass, and that within the range of his knowledge he never knew of anybody being injured in the case of the bursting of one of these glasses where the shield was on.

Mr. Lynes, likewise an engineer of experience, testified that where the shield was absent it was the duty of the engineer to advise the watchman as to the extraordinary risks that attended the use of the glass without a shield.

The instruction in question, having in mind these facts thus testified to, and also having in mind the experience of the respondent, was proper.

As to instruction number 15, given at the instance of the respondent, it is suggested that it had a tendency to confuse the jury as to the party upon whom the burden of proof rested. It is said that the instruction would give the impression that there was a shifting of the burden of proof, because the defenses of contributory negligence and assumption of risk were interposed.

The instruction in question directed the jury that before the respondent could recover, he was required to show, by a preponderance of the evidence, that the appellants were neglectful, but that the appellant's claiming that the injury was due to his own fault, and that it was the result of the risk that he assumed, as to these defenses, the defendants were required to establish them by a pre-

ponderance of the evidence, and the burden was upon them to do this. With directions so explicit, we are at a loss to understand how the conclusion is reached that the instruction, in its phraseology, suggested a shifting of the burden of proof.

Objection to instruction number 16 is based on the alleged error of wrongfully admitting evidence as to the extent of the injuries and the impairment of earning capacity. If this evidence was rightfully admitted, then confessedly the instruction was one proper to be given. The alleged error in the giving of this instruction stands or falls on how the questions are determined, as to whether or not these items of evidence were properly in the case. These propositions are heretofore fully discussed.

These are the objections that are urged against the instructions given at the instance of the respondent, and it is said that the giving of them operated to the prejudice of the defendants, as the verdict showed. Whether this is a covert intimation that the verdict is excessive, or whether the verdict in favor of the plaintiff should be rendered at all, we are unable to divine. If the former, it is unauthorized, as the courts generally have fixed the value of an eye, where its loss results from neglectful conduct, at an amount in excess of the sum awarded here, and that, too, regardless of any loss independent of the eye itself.

Voorhees on Measure of Damages for Personal Injury, Sec. 70.

As to the instructions requested by defendants and refused, numbers 6, 7 and 8, we take issue as to the instructions being proper or as correctly stating the law. Besides being incorrect, they ignore an element of liability depended on, to-wit, neglect on the part of the defendants to advise the plaintiff as to the dangers attendant upon the use of the glass without a guard. The instructions in question take one single element of the case, to the exclusion of the other elements, and ask that upon a determination of that element in favor of the defendants, a verdict should be rendered in their favor.

It is as to instructions such as these that the supreme court of Utah directed its remarks in the case of

**Herndon v. Salt Lake City, 95 Pac. 652,**

**when it said:**

**"Upon the other assignments respecting the refusal of the court to give the other requests offered by the city we are of the opinion that those were sufficiently covered by the court's general instructions. We remark, however, for the benefit of counsel, that about all the requests offered uniformly ended with the request to find for the city. It does not necessarily follow that because an instruction states the law fully and correctly upon one issue the jury should therefore find generally for the plaintiff or the defendant as the case may be. The jury should be told what their findings should be upon that issue only unless the particular issue is decisive of the whole case. Trial courts very often must refuse, and this court is compelled to sustain the refusal, to**

give correct statements of the law simply because they end by directing the jury to determine the whole case upon one request. Nearly all of appellant's requests, 10 or 12 in number, end in this way, and the court did not err in refusing them for that reason if for no other."

See likewise

Condee v. Rio Grande Ry. Co., 97 Pac. 123.

As to instruction number 13, refused, it is objectionable on many grounds. It is clearly a judicial determination of the value of the evidence, and a usurpation, under our practice, of the functions of the jury. It in effect told the jury that because a statement was signed setting forth a given state of facts that the statement should be accepted as determinative of those facts as against a subsequent statement at variance therewith.

It was for the jury to say which statement should be received, in the light of the explanation offered, and this instruction relieved the jury of that responsibility. This court has so often declared that instructions commenting on the weight of the evidence or the credibility of the witnesses are improper that reference to the cases is deemed unnecessary.

Instruction number 12, given to the jury, covering the same ground, correctly advised them as to this matter, and furnished to the jury all the advice, under our practice, that could be properly given.

Finally it is urged that on the evidence a verdict should be directed for the defendants; that as the plaintiff was twenty-seven years of age, there was no need for advice or warning of any character, and that he saw the glass without a guard and assumed the risk incident to its use in this way. Again we feel constrained to take issue on this proposition. It is said that a man of ordinary intelligence knows that glass is fragile and that it will break, and that under these circumstances the plaintiff must have known that the water glass in question was liable to break, and that he cannot complain because it did, and that any instruction in reference to it would be unavailing.

In the first place we do not believe that in the case of a glass of this kind, used for the purpose intended, the plaintiff was justified in assuming, in the light of his experience, that it was likely to break. Indeed, if this were true, there would be no basis for recovery in a case of this kind, and yet we find that such cases exist, and a recovery for injuries sustained on account of the breaking of the glass is authorized. This is true in reference to the Wisconsin case *supra*. It is true in the case of

Klunk v. Hocking Valley R. Co., 20 Am. Neg. Rep. 177.

It is true in the case of

Nicholas v. Albert Lea Light & Power Co.,  
119 N. W. 503.

These are cases where the engineer or fireman

suffered injury on account of the breaking of the glass, and they were not summarily disposed of by the courts on the assumption that glass breaks, and this fact must have been known to the engineer and fireman.

We will be pardoned for quoting at some length from the case of

**C. B. & Q. Ry. Co. v. Griffin, 157 Fed. 914:**

"The general rule is that where one enters the employ of another he 'assumes the usual risks of the service, and those which are apparent to ordinary observation, and, when he accepts or continues in the service with knowledge of the character of structures from which injury may be apprehended, he also assumes the hazards incident to the situation.' **Texas Pacific Railway v. Archibald, 170 U. S. 665-673, 18 Sup. Ct. 777, 780, 42 L. Ed. 1188.** It is equally well settled that the master is bound to use ordinary care in the matter of furnishing and maintaining reasonably safe machinery. We consider that view to be correct, also, which holds that this duty of the master is so far personal and inalienable that responsibility for damages caused by the negligent discharge of it exists. And just here it is that the plaintiff insists that this rule gives him a cause of action, since his employer failed to use care in providing him with a suitable and safe engine, in this: that the water glass in the engine furnished him was without a proper appliance, namely, a screen over the water glass in the cab of the engine, and that it was this omission that caused the injury for which a recovery is sought.

"It was admitted in the pleadings and shown by the evidence at the trial that there was no screen over the water glass on the engine upon which the plaintiff was working and that this was true of all other engines used by the defendant company. It may be conceded too,

we think, that it is sufficiently averred in the petition and established by the evidence that this was the proximate cause of the injury here complained of; but, if it be conceded that the want of a screen covering the water glass was the direct cause of the injury, the immediate question is: Do the pleadings and evidence, notwithstanding, set out and establish a cause of action? It will be observed that, in the view we are now considering the case, the complaint is that there was no screen covering the water glass located in the cab. The plaintiff in the court below was an engineer and fireman of large experience, and the defect of the engine in this respect was known to him, or was so plainly observable that he must be presumed to have had knowledge of it. The evidence shows that it was his duty, as well as the duty of the engineer, to watch the condition of the water in the boiler. This duty was peculiarly within his department, and, if he voluntarily continued to use the engine without the water glass being screened, we think he must be held to have assumed the risk of so doing, and cannot visit it upon the employer. To this general rule as above stated there are, of course, exceptions, as, for instance, where the servant injured has complained of the dangerous state of the machinery and the master has promised to remedy the defect, or in cases, perhaps, where the servant injured did not know or have reason to apprehend the danger, to which the defect of the machinery exposed him. But neither the allegations of the petition nor the proof bring this case within the principle of the exceptions; on the other hand, as we view it, the case falls within the general doctrine that a servant cannot continue to use a machine he knows to be dangerous at the risk of his employer."

Having in mind these qualifications, and they are fundamental where the defense of assumption of risk is interposed, we have before us a young



man who ten days before the accident was employed as a watchman. The duties which he was required to perform called for no knowledge of machinery. There was no implied assurance in accepting this employment that he possessed such knowledge. He was simply required to keep the fire alive and if the water in the engine got low to pump some in. His only association with the water glass was to look at it and from this inspection to determine whether the water in the boiler was getting low. The duty primarily rested with the company to exercise reasonable care to see that the glass was safe, and in order to make it reasonably safe, a shield was necessary. Without a shield it was dangerous and was a risk which plaintiff did not assume. Without a shield the engineer or fireman accustomed to those glasses might readily appreciate the danger attendant upon its use, but to the plaintiff, inexperienced as he was, it was just as harmless without the shield as with it. Notwithstanding the extraordinary danger, the engine was turned over to him without his being advised in any way of the risk to which he was subjected.

We contend, on these facts, a case is developed that could not be disposed of as a proposition of law by a motion to direct a verdict for the defendants, a case which makes applicable the principle that before a servant is disabled from recovering, the risk must be one that is incident to his employment, or is a risk that is apparent to him as a reasonable

man, the danger of which he could reasonably appreciate.

The rule that we invoke is stated clearly and fully in the case of

Rummel v. Dilworth, 131 Pa. 509, 19 Atl. 345,

as follows:

"The general rule that a workman assumes the risks incident to his employment when he enters upon it is well settled, but its application is subject to certain qualifications. He certainly has the right to expect his employer to provide machinery, tools, and appliances that are reasonably safe for his use, and he assumes no risks growing out of their defective character, unless he has been fully advised that they are defective and dangerous. He has the right to suppose that his employer has provided such guards and means of protection from injury, in the use of the machinery, tools, and appliances, as are usual and reasonably necessary for his safety; and he cannot be held to assume the risks attendant on their absence, unless such absence is apparent, or his attention has been called to it. . . . If the plaintiff did not appreciate the danger of the work he was doing, arising from the defective appliances, and if the defendants were not justified in supposing he understood it, it cannot be held that, in the contractual relation of master and servant, he assumed the risk which resulted in his injury."

See likewise

Burnside v. Peterson, 17 L. R. A. (N. S.) 76.

On the facts and on the law we submit that the verdict was warranted and should stand.

Respectfully submitted,

WALSH & NOLAN,

*Attorneys for Respondent.*





IN THE  
**Supreme Court**  
OF THE  
STATE OF MONTANA

---

JOHN H. O'MEARA,

*Respondent,*

VS.

PETER T. McDERMOTT,

*Appellant.*

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BRIEF OF APPELLANT.

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I. STATEMENT OF CASE.

The respondent sued the appellant, and in his complaint alleged that on the 27th of March, 1907, the appellant, for value, executed and delivered to respondent a promissory note and agreement of the following tenor:

“Butte, Mont., March 27, 1907.

“For value received, I, the undersigned, promise to pay John O'Meara or his heirs the sum of twelve thousand (\$12,000) dollars, under the following terms and conditions, to-wit:

“Payments shall be made subject to the conditions and agreements of the existing lease

and bond held by Messrs. Galiger and Clymo, from the undersigned, acting as agent for Rt. Rev. John P. Carroll, in the sale of the Burke and Balaklava Mining Claims, Silver Bow County, Montana.

"Six thousand (\$6,000) dollars shall be paid upon completion of second payment on said lease and bond, less whatever portion of said six thousand (\$6,000) dollars shall have been paid before that time.

"The balance, six thousand (\$6,000) dollars, to be paid not later than ten (10) days after the completion of the terms of said lease and bond and the fulfillment thereof.

"Failure to meet payments as specified in said lease and bond agreement nullifies this note.

"PETER T. McDERMOTT."

That the terms and conditions of the agreement were complied with, and that the note was not paid and a judgment for the amount was demanded.

In the second count of the complaint it was alleged that between the first day of October, 1907, and the first day of April, 1906, services were performed in and about procuring purchasers for the Burke and Balaklava lode claims, for which the defendant agreed to pay a reasonable price, and that the reasonable value of the services performed was \$12,700, of which \$700 had been paid, and judgment was demanded for the unpaid balance; and in a third count it was alleged that the services mentioned in the second count were rendered at the special instance and request of the appellant at the agreed price of \$12,700, of which \$700 had been

paid, and the prayer of the complaint demanded, on the three counts, judgment for \$12,700, with interest at the rate of eight per cent.

**Complaint, transcript, pages 5-8.**

The answer alleged that when the note sued on was executed and delivered, the respondent and one John Kerrigan were threatening to bring suit for services alleged to have been rendered the appellant as attorney in fact for the Roman Catholic Bishop of Helena, in connection with the sale of the two mining claims referred to. That prior to the execution of the note, he disclaimed and denied such indebtedness, but that anxious to avoid suit, he executed and delivered the note in question upon the condition that the respondent and Kerrigan would execute and deliver to him a release and acquittance of all claims and demands against him, which they agreed to do, and that the delivery of the note was made with that understanding for that consideration, and that such release and acquittance was never surrendered to him, and that the note in question was without consideration.

In the answer it is likewise stated that on or about the 27th of March, 1907, the note in question was delivered to the respondent, but that he refused and declined to accept it. It is likewise set forth in the answer that the lease and bond mentioned, and held by Galiger and Clymo was not performed, and that the payments were not made as provided for; that the agreement was after-

wards changed, and that Galiger and Clymo, or either of them, never paid any part of the purchase price, as provided for in the lease and bond, and that the note in question is of no force and effect on that account.

There is also pleaded a former adjudication. This plea rests upon the action tried by respondent and Kerrigan against the appellant, upon the theory that they were entitled to share in the profits resulting in the sale of the claims on account of a partnership relation existing. There is a denial of the cause of action pleaded in the second and third counts, and the plea of former adjudication is likewise set forth as to them.

Answer, transcript, pages 10-16.

In the replication it is alleged that if the agreement with Galiger and Clymo was not met, as set forth in the complaint, that it was due to the appellant's causing the agreement not to be met, and consenting to its not being met, for the purpose of defeating the contract with respondent, and that in consequence of this, the appellant is estopped from asserting that the payments were not made as specified in the lease and bond.

Reply, transcript, pages 17-19.

On the 13th of May, 1908, a motion for judgment on the pleadings was presented by the appellant, which was overruled and an exception duly preserved.

Transcript, pages 34-37.



A motion was then made for a continuance by the appellant on account of the absence of W. O. Clymo, a witness. The motion was denied and to the court's ruling an exception was taken.

Transcript, pages 37-39.

The case was tried to a jury.

Transcript, page 36.

Upon the respondent's being sworn, and before the introduction of any evidence, the appellant objected to the introduction of any testimony for the reason that under the pleadings it was admitted that the cause of action had theretofore been tried and determined, and that a judgment was entered in the cause thus tried. This objection was overruled and an exception taken to the court's ruling.

Transcript, page 40.

The note sued on was offered in evidence and objected to, but it was admitted over objection.

Transcript, page 41.

An option on the mining claims was given to John P. Carroll, Bishop of Helena, Montana, to the appellant on October 1, 1906. This option was objected to and the objection overruled and an exception saved,

Transcript, pages 46-47,

as was likewise all of the evidence in reference to the option.

Transcript, page 45.

The respondent testified about the services that were performed by him towards promoting the sale of the mining claims in question,

Transcript, pages 50-51,  
and was permitted to testify what the purchase price of the mining claims was.

An objection was made to the introduction of this testimony on the ground that the deal was in writing, and that the writing was the best evidence. This objection was overruled and an exception saved.

Transcript, page 54.

An instrument, marked Exhibit "D", was offered in evidence, which reads as follows:

"Bishop's House, Helena, Montana,  
"Feb. 1, 1907.

"Mr. T. P. McDermott, Butte, Montana.

"Dear Sir:—I hereby authorize you to act as my agent in the transfer and sale of the Burke and Balaklava mining claims, situated in the Butte District, Silver Bow County, for a period of sixty (60) days from date.

"Roman Catholic Bishop of Helena,  
Montana, By John P. Carroll, Bishop."

This instrument was objected to, and the objection overruled.

Transcript, page 55.

The respondent stated that he made efforts to sell the property, and was then asked the following question:

"Do you know what was paid for some services of a similar nature to those which you

performed for Mr. McDermott and in a same transaction and during last year ?

"Mr. McHatton: Objected to on the ground that the same is irrelevant and immaterial in this case; that it would not in any way tend to establish the allegations of plaintiff's complaint, or to establish any right upon his part to recover any amount in the case; and that it is inadmissible under the pleadings. It is further objected to on the ground that the witness is not qualified, nor would the statements qualify the witness to testify to anything about the matter.

"The Court: If it is for the purpose of qualifying him, I will overrule the objection.

"Mr. Maury: It is for the purpose of qualifying him.

"The Court: The objection is overruled.

Just answer yes or no.

"To which ruling of the court, defendant there and then duly asked for and was allowed an exception.

"A. Yes, sir.

"Q. What was the value of your services, rendered to Mr. McDermott in the sale of the Burke and Balaklava lode claims.

"Mr. McHatton: Objected to on the ground that the witness is not competent to testify, and that his answer to the question would be incompetent, irrelevant and immaterial. I further object, with reference to a sale of the Burke and Balakava lode claims, rendering the question and the answer sought to be elicited by it incompetent and irrelevant. The only question being whether he rendered services, what the services were, and what they were worth, aside from any sale of the claim.

"The Court: The objection is overruled. To which ruling of the court defendant then and there duly asked for and was allowed an exception.

"My services, I considered worth more than \$25,000."

Transcript, pages 56-57.

The witness then stated that McDermott was to give him \$21,000, \$10,000 when he came back from Helena and the balance in stock—\$25,000 in stock,

Transcript, page 57,

and that he received \$700.

The witness was asked upon cross-examination as to whether the services that he was then suing for were not the same services for which suit had theretofore been brought, and an objection was interposed to the question and the objection was sustained.

Transcript, page 59.

The respondent stated that the only services for which he was suing were the services in connection with the lease and bond to Galiger and Clymo. Witness upon being confronted with the testimony at the former trial said that there was no compensation or agreement mentioned between himself and the appellant that when they entered into the agreement, they did so as partners.

Upon cross-examination he was asked to as whether Galiger and Clymo's agreement was carried out, and an objection was interposed and sustained and an exception preserved.

Transcript, page 86.

He stated that when he took the note, he took it as a part payment of what was coming to him as partner,

Transcript, page 87,

and was allowed to testify over objection as to other deals that were in contemplation respecting the property and the compensation he was to receive if those deals went through.

Transcript, pages 97-98.

There was likewise offered in evidence an escrow agreement, providing for the delivery of a deed upon the payment being made as specified,

Transcript, pages 101-102,

and a modification of same,

Transcript, pages 103- 104,

and the fact was developed that the payments were not made as provided for in the modified agreement.

Transcript, page 105.

The lease and bond given to Galiger and Clymo appears in the transcript at page 116.

Mr. Kerrigan, a witness for respondent, was asked as to the statements made by the appellant as to how much of the purchase price was coming to the owner of the property, for the purpose of showing the value of respondent's services. This was objected to, and the objection overruled and an exception saved.

Transcript, pages 148-149.

Upon the submission of plaintiff's evidence, a motion for a non-suit was interposed by appellant,

Transcript, pages 155-156,

and the motion was sustained as to the third cause

of action, or the cause of action stated in the third count, and overruled as to the other two.

To the action of the court in overruling the motion, an exception was saved.

Transcript, page 156.

When appellant was testifying, he was asked as to the claims of the respondent and Kerrigan in the trial of the action where they were seeking to recover on account of the services rendered by them in connection with the sale of these claims, and this testimony was excluded.

Transcript, page 164.

He was likewise asked if the note in question was not in that suit offered in evidence as a part of the consideration of the partnership referred to, and this evidence was likewise excluded.

Transcript, pages 165-167.

The question was put to appellant as to whether he had anything to do with the change of the agreement for the purpose of defeating same. Objection was interposed and the objection was sustained.

Transcript, page 168.

He was likewise asked as to whether, upon the trial of the case, where the partnership proposition was involved, respondent did not claim that no responsibility existed on account of the execution of the note. Objection was interposed and the objection was sustained.

Transcript, page 185.

Upon cross-examination, appellant was asked to show how much money he had received on account of the sale of the mines, and over objection he was required to state what he had received,

Transcript, pages 197-198,

and then was asked and required to answer, over objection why his services were more valuable than those of respondent.

Transcript, page 199.

Mr. Berkin was examined in behalf of the appellant, and testified to the value of the services rendered by respondent, and upon cross-examination was asked as to what the value of the services of a promoter was. These inquiries were objected to and the objections were overruled.

Transcript, pages 226-227.

Mr. Clymo, on account of whose absence an application for a continuance was made, was in California at this time, and the testimony given by him where the partnership proposition was involved, contradictory to respondent's testimony, was attempted to be established. The testimony was excluded and an exception preserved.

Transcript, pages 368-372, 384.

Under the ruling of the court the specific portions of Clymo's testimony which it was claimed were contradictory of respondent's testimony on the stand were excluded, and likewise the testi-

mony in its entirety. The offered testimony, excluded, appears in the

Transcript, pages 367-372, 375-376, 384-437.

The judgment roll in the case where the partnership was attempted to be established was offered in evidence and excluded,

Transcript, page 437.

A request for findings was made by appellant,

Transcript, page 455,

which request was denied.

Transcript, page 457.

It is claimed that errors were committed in the giving and refusing to give instructions, but these alleged errors will be set forth in the specification of errors, and will be discussed in the argument so that the consideration of them in the statement is dispensed with.

A verdict for the plaintiff was rendered for \$12,000,

Transcript, page 30,

and a judgment rendered and entered on this verdict.

Transcript, page 31.

A notice of intention to move for a new trial was served and filed.

Transcript, pages 514-515.

The motion for a new trial was denied,

Transcript, page 516,

and this appeal is taken from the judgment and the order overruling the motion for a new trial.

Transcript, page 521.



## II. SPECIFICATION OF ERRORS.

1. The court erred in overruling appellant's objection to the following question:

"What is the value of your services rendered to Mr. McDermott in the sale of the Burke and Balaklava lode claims?"

Transcript, page 57.

2. The court erred in sustaining appellant's objection to the following question:

"What if anything did you personally have to do with changing the agreement for the purpose of defeating this agreement, or any purpose?"

Transcript, page 168.

3. The court erred in admitting the note and agreement in evidence over objection.

Transcript, pages 41-43.

4. The court erred in permitting the respondent to testify what the purchase price of the mining claims was.

Transcript, page 54.

5. The court erred in sustaining an objection to the following question asked respondent:

"And by saying 'I was suing as a partner,' I will ask you if you were not suing for the same services that you have testified about here? Say yes, or no."

Transcript, pages 58-59.

6. The court erred in sustaining an objection to the following question asked the respondent:

"Well, you don't know whether it was carried out at all or not?"

Transcript, page 86.

7. The court erred in sustaining an objection to the follownig question asked respondent:

"There has been introduced in evidence here this paper marked plaintiff's Exhibit A. I will ask you if you do not know that other parties than Galiger and Clymo obtained an interest in this property and had dealings with the Bishop after this time with reference to it?"

Transcript, page 86.

8. The court erred in overruling an objection to the following question:

"Do you recall what share of the profits you were to receive in the Gallwey deal, if it had gone through?"

Transcript, page 97.

9. The court erred in overruling an objection to the following question asked the witness Kerri-gan:

"Can you recall anything that McDermott said as to how much of the purchase price was going to the Roman Catholic Bishop?"

Transcript, page 148.

10. The court erred in overruling appellant's motion for a non-suit as to the first cause of action.

11. The court erred in sustaining an objection to the following question asked appellant:

"What was this paper offered in evidence for if you know?"

Transcript, page 165.

12. The court erred in sustaining an objection to the following question:

"Let me ask you if it was not offered in

evidence as a part consideration for the partnership ?”

Transcript, page 165.

13. The court erred in sustaining an objection to the following question :

“Was it offered for the purpose of showing any liability on your part in that case ?”

Transcript, page 166.

14. The court erred in sustaining an objection to the following question :

“Can you state for what purpose it was expressly offered ?”

Transcript, page 166.

15. The court erred in sustaining an objection to the following question :

“It is charged in this complaint ‘That he,’ meaning you, ‘has refused to make any accounting, though he has acknowledged in writing and agreed to pay plaintiff, O’Meara, the sum of twelve thousand dollars when the payment shall be made by Galiger and Clymo.’ Do you know what that refers to ?”

Transcript, pages 166-167.

16. The court erred in sustaining an objection to the following question :

“Do you know whether he contended in the trial of the other case that you were liable to him on that note ?”

Transcript, page 184.

17. The court erred in sustaining an objection to the following question :

“You may state whether upon the trial of

the other case, he claimed you were responsible to him on that note ?”

Transcript, page 185.

18. The court erred in sustaining an objection to the following question :

“Are you in any wise indebted to the plaintiff in this case indebted to the plaintiff of this case ?”

Transcript, page 185.

19. The court erred in overruling an objection to the following question :

“How much money have you been paid by the Reverend John P. Carroll, as Bishop, out of the moneys received by him on the sale of the Burke and Balaklava lode claims since January 18th, 1908.”

Transcript, page 197.

20. The court erred in overruling an objection to the following question :

“But previous to that time he had paid to you the sum of \$10,000 on the same account?”

Transcript, page 198.

21. The court erred in overruling an objection to the following question :

“There is no price which you can fix on the value of services in the promoting of property, in the sales of mining property ?”

Transcript, page 226.

22. The court erred in overruling an objection to the following question :

“Suppose he were not hired, but were working jointly with the other, or another, who was

promoting a sale, and that there was no agreement as to the exact amount of compensation, have you no way of fixing the value of his services?"

Transcript, page 227.

23. The court erred in sustaining an objection to the following question:

"I will ask you if Mr. Clymo was not asked this question: 'Did he have anything to do with the fixing of the price of this property?' referring to the plaintiff?"

Transcript, page 367.

24. The court erred in sustaining an objection to the offered proof as to the testimony of W. O. Clymo at a former trial, contradictory of the testimony of respondent, and introduced for the purpose of impeaching respondent.

Transcript, pages 369-370.

25. The court erred in sustaining an objection to the following question:

"State what if anything Mr. Clymo said at that time with reference to Mr. O'Meara assisting in any way in the report which Mr. Clymo testified to having gotten up for the property?"

Transcript, page 372.

26. The court erred in excluding the offered testimony of Mr. Clymo.

Transcript, pages 384-437.

27. The court erred in excluding the judgment roll offered in evidence.

Transcript, page 437.

**28. The court erred in refusing to submit to the jury the findings requested.**

**Transcript, pages 455-457.**

**29. The court erred in not requiring the respondent to elect as to which cause of action he would rely upon.**

**Transcript, page 458.**

**30. The court erred in overruling the motion for a new trial.**

**Transcript, page 516.**

**31. The evidence is insufficient to sustain the verdict and judgment.**

**32. The court erred in giving to the jury instruction No. 1, which is as follows:**

**“If you find from a preponderance of the evidence in this case that John H. O’Meara at the request of Peter T. McDermott, performed services for said McDermott of the reasonable value and price of twelve thousand seven hundred (12,700.00) dollars, and that only the sum of seven hundred (\$700.00) dollars has been paid, then your verdict must be for O’Meara and against McDermott for twelve thousand dollars and interest at eight per cent per year from March 5, 1908,—or Gentlemen of the Jury,**

**“If you find from the preponderance of the evidence that for a valuable consideration (and that such valuable consideration proceeded from O’Meara to McDermott before the writing described in the complaint was delivered to O’Meara by McDermott) McDermott delivered the writing set forth in the complaint and in evidence here marked Exhibit ‘A’ and that the payments required by the contract called in the evidence the Galiger-Clymo**

contract were met substantially as set forth in the said contract, then your verdict must be for John H. O'Meara and against Peter T. McDermott for twelve thousand (\$12,000.00) dollars and interest thereon at eight per cent per annum commencing ten days after the date of the last payment on said contract.

"If you find for the plaintiff you can only award him damages on one or other of his first two causes of action and not on both."

Transcript, page 20.

33. The court erred in giving to the jury instruction No. 2, which is as follows:

"The court instructs the jury:

"That the following presumptions are satisfactory if uncontradicted:

"(1) That a thing delivered by one person to another belonged to the latter;

"(2) That there was a good and sufficient consideration for a written contract."

Transcript, page 21.

34. The court erred in giving to the jury instruction No. 1-a, as modified, which is as follows:

"You are instructed that before the plaintiff can recover in this action he must prove one or the other of the causes of action set forth in his complaint by a preponderance of the evidence; therefore, if you find that he has failed to produce a preponderance of the evidence in support of either of his causes of action, you must find against him, or if you find that the evidence is evenly balanced as to both you must find against him. A preponderance of the evidence is the greater weight thereof, and unless, upon a consideration of the evidence in this case, you find that the greater weight of the same is in favor of the plaintiff, as to one or the other of his causes of action, you must find for the defendant."

Transcript, page 21.

35. The court erred in giving to the jury instruction No. 2-a, as modified, which is as follows:

"You are instructed that you must find a verdict in this case upon the testimony introduced herein and the instructions of the court; that you must confine your considerations to that testimony and those instructions, and if, from the testimony, and the instructions you believe that the plaintiff is not entitled to recover upon either of his causes of action you must return your verdict for the defendant."

Transcript, page 22.

36. The court erred in modifying instruction No. 3-a, requested by defendant, and giving the instruction as modified, which is as follows:

"If you find that the plaintiff performed services for the defendant with reference to the sale of the Burke and Balaklava lode claims, then you will determine whether the \$700.00 which was paid by him by the plaintiff was sufficient to compensate him therefor.

"You are instructed that all the plaintiff could recover would be what his services were reasonably worth.

"You are further instructed that if you find from the evidence that the plaintiff has been fully compensated for the services, if any, rendered the defendant, then you must find against him on his second cause of action."

Transcript, page 22.

37. The court erred in giving instruction No. 6-a, as requested, but instead of doing so modified the instruction, and when so modified gave it to the jury. The instruction, as modified, is as follows:

"You are instructed that the plaintiff in this case is a minor and that you are entitled to take into consideration that fact. If you find



he rendered any services at the request of the defendant, for which the defendant should pay him, he is only entitled to a reasonable compensation for the services which he performed in the capacity in which he worked for the defendant and performed the services; and if you find that he did render services and that he is not entitled to an amount exceeding seven hundred dollars therefor, then you will return a verdict for the defendant as to his second cause of action."

Transcript, pages 23 and 464.

38. The court erred in refusing to give instruction No. 8-a, which is as follows:

"You are instructed that with reference to the contract pleaded by the plaintiff and relied upon in this action, that the same contains a clause providing that it shall be of no force or effect if payments are not made by Galiger and Clymo, as provided in their agreement.

"You are further instructed that the testimony conclusively shows that Galiger and Clymo nor any one in their behalf made payments as in said contract provided; therefore the plaintiff is not entitled to recover on said contract."

Transcript, page 25.

39. The court erred in refusing to give instruction No. 9-a, which is as follows:

"You are instructed that where a party signs a contract which contains a provision that unless certain things are done within a certain time the same shall be of no effect, that the failure to do those things within the time specified violates the contract, and the party having the same cannot recover anything on account thereof."

Transcript, page 25.

40. The court erred in refusing to give instruction No. 10-a, which is as follows:

"You are instructed that the plaintiff pleads that if any change was made in said Galiger and Clymo contract it was made by the defendant fraudulently and for the purpose of preventing plaintiff from recovering upon said contract, and that there is absolutely no evidence of fraud on the part of the defendant in this case. You will therefore find that the defendant has not been guilty of any fraud in that connection."

Transcript, page 25.

41. The court erred in refusing to give instruction No. 11-a, which is as follows:

"You are instructed that John P. Carroll, Bishop of Helena, was the contracting party with Galiger and Clymo, and that the defendant was only the agent or attorney in fact of said Bishop and that if the Bishop consented to a change in said contract whereby the same was not performed according to the terms which existed therein at the time that the defendant gave said writing to the plaintiff, then the plaintiff cannot recover upon said contract."

Transcript, page 26.

42. The court erred in refusing to give instruction No. 14-a, which is as follows:

"You are instructed that the plaintiff testified that he accepted the agreement set forth in the complaint as for part of what was due him as a co-partner of the defendant. You are instructed that the court has heretofore tried and determined the question of co-partnership between the plaintiff and defendant and has found that no such co-partnership existed, and therefore you must disregard the contract set forth in the complaint, as that

matter was involved in the trial of the case of O'Meara and others against McDermott and others."

Transcript, page 27.

43. The court erred in refusing to give instruction No. 16-a, which is as follows:

"You are instructed that you must disregard all of the testimony with reference to services performed by the plaintiff and the matter in which the defendant acted with reference thereto, or what he said regarding the same prior to the 1st day of February, 1907, since the plaintiff only seeks to recover for services rendered to the defendant after the second day of February, 1907."

Transcript, page 27.

44. The court erred in refusing to give instruction No. 17-a, which is as follows:

"The jury are instructed that the plaintiff cannot in any event recover for any services performed for the defendant prior to the first day of February, 1907."

Transcript, page 28.

45. The court erred in refusing to give instruction No. 18-a, which is as follows:

"You are instructed that when you come to consider of the services rendered by the plaintiff for the defendant that the defendant was merely an agent of the Bishop of Helena, the owner of the property, and as such agent, engaged in endeavoring to make a sale thereof for the owner. You will therefore not consider in making up your estimate of the value of the plaintiff's services the amount which the owner received for the property or which Hall and Maloney received or which the defendant received, but will confine your consideration

to the services rendered by the defendant and what they were worth in this neighborhood."

Transcript, page 28.

46. The court erred in refusing to give instruction No. 19-a, which is as follows:

"You are instructed that if you find from the evidence in this case that the services for which the plaintiff seeks to recover were services for which he sought to recover in another case pleaded in the answer herein then you must return a verdict against the plaintiff in favor of the defendant, for it is a rule of law that where a party tries a case which goes to judgment against him that he cannot begin another case for the same matter and recover a verdict therein."

Transcript, page 29.

47. The court erred in refusing to give instruction No. 20-a, which is as follows:

"You are the judges of the credibility of the witnesses and the weight to be given to their testimony. If you find that any of the witnesses herein have testified wilfully and deliberately false as to any material matter then you are at liberty to disregard the entire testimony of said witness except in so far as the same is corroborated or sustained by the testimony of other witnesses."

Transcript, page 29.

48. The court erred in refusing to give instruction No. 21-a, which is as follows:

"The jury are instructed that the plaintiff cannot recover upon the first cause of action set forth in his complaint."

Transcript, page 29.

49. The court erred in refusing to give instruction No. 22-a, which is as follows:

"You are instructed that the plaintiff testified in this case that he did not render any services for the defendant for which he expected compensation. You are therefore instructed that unless you find from the evidence that the plaintiff rendered services for the defendant at the defendant's request and with expectation that he would receive compensation therefor, or under circumstances which you believe would entitle him to receive said compensation then you must return a verdict for the defendant."

Transcript, page 29.

50. The court erred in sustaining the objection made by respondent to argument of counsel, wherein counsel spoke as follows:

"I am arguing to the jury that it is alleged in the answer and admitted by the replication that the action mentioned in the answer was instituted in the district court, prosecuted by the plaintiff and his associate, and resulted in a judgment for the defendant,"

and erred in directing and admonishing the jury to disregard the statement.

Transcript, pages 471-472.

### III. ARGUMENT.

**FIRST CAUSE OF ACTION:** The first cause of action is based on the written agreement given on the 27th of March, 1907, which is as follows:

"Butte, Mont., Mar. 27, 1907.

"For value received, I, the undersigned, promise to pay John H. O'Meara, or his heirs, the sum of twelve thousand (\$12,000) dollars, under the following terms and conditions, to-wit: Payments shall be made subject to the conditions and agreements of the existing lease and bond held by Messrs. Galiger and Clymo, from the undersigned, acting as agent for Rt. Rev. Jno. P. Carroll in the sale of the Burke and Balaklava Mining Claims, Silver Bow County, Mont.

"Six thousand (\$6,000) dollars shall be paid upon completion of second payment on said lease and bond, less whatever portion of said six thousand (6,000) dollars shall have been paid before that time.

"The balance, six thousand (\$6,000) dollars to be paid not later than ten (10) days after the completion of the terms of said lease and bond and the fulfillment thereof.

"Failure to meet payments as specified in said lease and bond agreement, nullifies this note.

"PETER T. McDERMOTT."

Transcript, page 5.

The lease and bond referred to in the note appears at page 116 of the transcript. It is dated February 2, 1907, and by its express terms \$85,000 were to be paid within forty days after February 2, 1907, \$157,500 within four months, and \$157,500 within six months after the date of the first payment.

It is likewise provided in this lease and bond

that time is of the essence of the agreement, and that unless payments are made as provided for, the agreement should be null and void.

The condition of the note required payments to be made as provided for in the lease and bond, and unless the payments were so made, the note was to be null and void.

The respondent not only failed to show a compliance with these essential conditions, but he affirmatively shows a non-compliance with them.

An instrument was executed on the 14th of June, 1907, which provided for payments of different amounts and at different times from those named in the lease and bond. Under this latter instrument \$100,000 was to be paid on June 14, 1907, \$65,000 on or before December 1, 1907, \$75,000 on or before June 1, 1908, and \$75,000 on or before December 1, 1908,

Transcript, pages 103-104,

and the payments were actually made at times and in amounts at variance with both agreements referred to.

Transcript, page 105.

It will be seen that in the presentation of proof, the respondent failed in every particular to sustain the allegations of the complaint, and on the proof thus submitted a non-suit should have been granted.

Statesbury v. Power, 27 Mont. 469.

Where an obligation is contracted on condition that an event shall happen within a fixed time, the condition will be considered to have failed when the event has not occurred within the time.

Yateman v. Broadwell, 1 La. Ann. 424.

In the case of

Bagley v. Cohen, 50 Pac. 4,

the facts were as follows:

One G. contracted: "On or before sixty days, I, G. do hereby agree to pay B., or order, out of the profits realized by me from my business of packing raisins at M. during the present season, the sum of \$310 in gold coin of the United States of America."

A few days thereafter G. sold his interest in the raisin business and made no profits therefrom for that season. It was held that G. never became liable on the contract.

One who agrees in writing to pay a note held by another, when certain freight bills are paid, is not liable until the freight bills are paid, and it is not incumbent upon him to say that they are collected.

Freidenburg v. Auld, 5 Kans. 452.

See also:

American Nat'l Bank v. Ducey, 40 S. W. 551.

The rule is succinctly stated in

9 Cyc. 615, as follows:

"A promise may be conditional, that is, the performance may be due, not immediately, but only after the lapse of time or the happening



of a future event. In such cases as a rule the condition precedent must be exactly performed or fulfilled before the promise can be enforced."

The pleader evidently recognized this doctrine, as, in the pleading, it is alleged that the terms of the lease and bond and the fulfilments therefor have all been complied with; that ten days elapsed after the completion of the lease and bond, and that the payments were made as provided for in the lease and bond.

The proof, however, adduced affirmatively, shows to the contrary.

Section 6587 of the Revised Codes provides as follows:

"Where, however, the allegation of the claim or defense, to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance, within the last two sections, but a failure of proof."

Here we have an entire absence of evidence to support the material allegations of the complaint, and as a necessary consequence if the verdict is based on the first cause of action it cannot possibly stand.

Cyc. Vol. 31, p. 714.

Union Coal Co. v. Edman, 16 Col. 438, 27 Pac. 1060.

Harford Co. v. Wise, 75 Ind. 38, 25 Atl. 65.

Groll v. Tower, 85 Mo. 249, 55 Am. Rep. 358.

Morisette v. C. P. Ry. Co. 76 Vt. 267, 56 At. 1102.

But it may be claimed that the replication re-

moves the difficulty which we are discussing. The answer denies that the payments were made as provided for in the lease and bond, and that Galiger and Clymo never made the payments specified, and that the lease and bond became a nullity.

In the replication it is alleged that if the agreement with Galiger and Clymo was not met, that the defendant caused the same not to be met, and consented to the same not being met for the express purpose of defeating his contract, and that he is estopped from asserting that the payments were not met as specified in the lease and bond.

These averments are absolutely meaningless, and in no manner affect the principles heretofore discussed.

“Facts in a pleading should be alleged in issuable form, and not as a contingent or hypothetical proposition.”

Ency. Pl. & Prac., Vol. 6, page 270, paragraph 6.

In an action on an account annexed for the price of intoxicating liquors sold to the defendant, where the answer alleged ignorance of the claim sued on, and that if it should be made to appear that the plaintiff sold the goods to the defendant it would also appear that they were sold in violation of law, it was held that the evidence was not admissible to show that the sale was unlawful.

Suit v. Woodhall, 116 Mass. 547.

See also

Starbuck v. Dunkle, 10 Minn. 168.

Jamison v. King, 50 Cal. 132.

White v. Camp, 1 Fla. 118.

**SECOND CAUSE OF ACTION:** Here recovery is sought for services performed between the first day of October, 1906, and the first day of April, 1907, in and about procuring purchasers for the Burke and Balaklava lode claims, for which the defendant agreed to pay a reasonable price, and that the reasonable value of the services was \$12,700, of which \$700 had been paid.

The answer denies these allegations.

The services in question clearly contemplate a sale of real estate, and to authorize a recovery for such services, a written agreement should exist.

Section 5017 of the Revised Codes provides as follows:

“The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or his agent: 6.—An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation, or a commission.”

The services rendered in this case consisted in procuring purchasers for mining claims, and are clearly within the provisions of the statute referred to.

The question we are now discussing is not debatable. This court in the case of

King v. Benson, 22 Mont. 258,

said:

"No matter what services were rendered to defendant by Langhorne, and accepted by defendant, no recovery can be had for them, under the proof in this record, because there was no note or memorandum of any contract for such services in writing."

And more recently this rule was reiterated in the case of

Marshall v. Trerise et al. 33 Mont. 28.

The denial in the answer is as effective for letting in the statute of frauds, as if the statute had been specifically pleaded.

Dunphy v. Ryan, 116 U. S. 491.

May v. Rice, 101 U. S. 231.

Birchell v. Neastor, 36 Oh. St. 331.

Hunter v. Randall, 62 Me. 426.

Boston Duck Co. v. Dewey, 6 Gray, 446.

In the case of

Feeney v. Howard, 79 Cal. 984,

the court said:

"We think it clear upon principle that under our statute of frauds and system of pleading it is sufficient to deny the contract without referring to the statute. The old chancery idea that the statute must be specifically pleaded grew out of and is based upon, the assumption that a parol contract within the statute had some kind of validity. And one of the objects of the pleadings in chancery being for the discovery of evidence, we can readily see how the doctrine arose. But our statute declares, not merely that no action shall be maintained upon contracts within its operation, but that they are 'invalid.' A parol contract within such a statute is void."

Dung v. Parker, 52 N. Y. 496, 497.

Bull v. Stevens, 84 Fed. 922.

Raub v. Smith, 28 N. W. 676.

But it is needless to discuss this proposition at greater length. This court has recently had under consideration this identical question. In the case of

Mitchell v. Henderson, 97 Pac. 942,

decided in November, 1908, this court said:

“Recurring, however, to the first point raised in the motion to strike out the testimony of the plaintiff, and also in the motion for a nonsuit, it is the settled law in this state that where the making of the contract alleged in the complaint is put in issue by the answer, the defendant may avail himself of the statute of frauds without pleading it.”

Undoubtedly some of the services rendered by the respondent in this case were of such a nature that recovery for same could be had on a *quantum meruit*, but these are so interwoven with those against which the statute declares, as to render invalid the obligation in its entirety. The rule is, that if the services of the promoter, looking to sales of the mining claim, are blended with the services of the miner performing the acts for which recovery might be had upon a *quantum meruit*, then the entire contract is void and no recovery can be had.

Miller v. Pelletier, 4 Edw. Chanc. 102.

Hayer v. Peck, 13 Wend. 53.

Crawford v. Morrell, 8 Johns. 253.

Baldwin v. Palmer, 10 N. Y. 232.

Clark v. Davidson, 53 Wis. 317.

Howard v. Brown, 37 Oh. St. 402.

Meyers v. Schemp, 67 Ills. 469.

Irvine v. Stone, 6 Cush. 508.

Van Alsyne v. Wimple, 5 Cow. 162.  
DeBeerski v. Paige, 36 N. Y. 537.  
In re Kessler's Estate, 59 N. W. 129.  
Little v. Needham, 39 Mich. 147.  
Filler v. Reed, 38 Cal. 99.  
Potter v. Arnold, 5 Atl. 379.  
Brown on Stat. Frauds, Chap. 9.  
Beckner v. Mason, 2 Pac. 850.

Assuming that a recovery might be had for the services performed, to which the statute of frauds did not apply, then the verdict is grossly excessive, as the testimony uncontradictedly shows that for these services an amount in excess of \$300 should not be allowed. The only testimony at all adduced giving a value to such services was the testimony of Donahue and Berkin.

Transcript, pages 226 and 230.

Berkin says that the services referred to were worth \$100 and Donahue that they were worth \$200 or \$300.

The record before us contains over 500 pages, and contains objections interposed by appellant almost innumerable, many of which we must admit are devoid of merit, but a careful scrutiny of this record fails to reveal a single instance where an objection interposed by the appellant was sustained, or where an objection interposed by the respondent was overruled. It may be due to the fact that the appellant was invariably wrong and the respondent invariably right, but we believe we can demonstrate the fallacy of this assumption.

## ERRORS IN RULINGS OF COURT:

(a) The respondent, over objection, was allowed to testify as to the purchase price.

Transcript, page 54.

This evidence could only be competent in the event that the respondent was entitled to recover for services as a promoter.

Undoubtedly the profits of the deal would be competent in such a case, and as bearing upon that question the price paid for the property would be an element proper for consideration to determine what the profits were. As a promoter the services had to do with the sale of real property, and as we have already shown the contract for such services should have been in writing. The evidence could not possibly have any bearing on the question of the value of the services rendered by plaintiff as a miner. The value of these services did not depend on the price paid for the property, but depended solely on the character of the work done and the price generally paid for that work. This testimony brought directly to the notice of the jury that McDermott was making a fortune out of this deal, and it undoubtedly influenced them in giving a value to the services performed as a miner, by plaintiff, which they otherwise would not have done.

(b) In the replication the averment was made that McDermott caused changes to be made in the

lease and bond, as to the payments that were to be made and the time when they were to be made, for the purpose of defeating recovery on the note, and in consequence of so doing, he should be estopped from asserting that the payments were not made as specified in the lease and bond.

It certainly was proper to rebut this assumption, and for the purpose of doing so, the following question was put to the appellant:

“What if anything did you personally have to do with changing the agreement, for the purpose of defeating this agreement, or any purpose?”

Objection was interposed and sustained. It is true, that notwithstanding the ruling of the court, the witness practically answered the question.

Transcript, page 168.

We cite this as an instance, however, of the attitude of the court, as it seems to us, under the circumstances, there could be no question as to the propriety of this inquiry.

(c) The note was admitted in evidence over the objection of appellant.

Transcript, page 42.

The note, by its express provisions, created a conditional liability. Unless certain things were done, there was no liability at all on account of its execution and delivery. Indeed, by its express provisions, unless the conditions named were performed, the instrument was a nullity. It is axio-



matic that before the note was competent a compliance with these conditions should have been shown. Indeed, the fact is that the evidence afterwards introduced affirmatively showed the contrary.

Where the performance of an agreement depends on an act to be done by the plaintiff, the doing of such an act is a condition precedent, and the court will not inquire whether the doing of the act is beneficial to the defendant.

Cyc. Vol. 9, p. 615.

(d) The respondent was asked the following question, and over objection was permitted to answer same:

“Q. What was the value of your services rendered to Mr. McDermott in the sale of the Burke and Balaklava lode claims?”

“A. My services I consider worth more than \$25,000.”

Transcript, page 57.

This is all of the evidence there is in the record as to the value of respondent's services, upon which the verdict stands. At this time there was evidence that on the 3rd or 4th of October, the respondent came from Billings to Butte on account of a letter that he received from his wife, written at the instance of McDermott, and as a result of the talk that he had with McDermott he hired a man to clean out a shaft, who worked for three days; that

McDermott directed him to have a talk with Galiger and Clymo; that these gentlemen would call on him, and that he should take them to the mining claims and explain where the leads were; likewise explain the cross-cuts underneath the adjoining property, and that he should likewise make a report on the property and should tell them what he knew of the property.

We contend that the respondent did not possess a qualification to entitle him to answer the question as he did.

Little Rock & Ft. Smith Ry. Co. v. Bruce, 17 S. W. 363.

Cincinnati Tract. Co. v. Stevens, 79 N. E. 235, 45 Oh. St. 71.

Miller v. Early, 58 S. W. 789.

Schule v. Cunningham, 14 Daly 404, 27 O. C. C. Rep. 679.

In this connection, it is only proper to state that in a case of this kind it is the reasonable value of the services that is the subject of inquiry, and in the answer to the question propounded, we have undoubtedly an exaggerated statement of the witness as to the value of his services without regard to the fact as to whether in the light of his experience, that estimate was or was not reasonable. We submit that the objection to this question should have been sustained.

(e) Upon cross-examinaion of respondent, and for the purpose of showing that the claim for services on a contract basis was lacking in merit and sincerity, the following question was asked:

**“By saying ‘I am suing as a partner,’ I will ask you if you were not suing for the same services that you have testified to here? Say yes or no.”**

**This was objected to as calling for a conclusion of law and the objection was sustained.**

**In a former suit, an effort was made to establish a partnership, and the services in question were rendered by plaintiff as a partner. Surely, it was competent upon cross-examination to show, in the light of the change of front, what the answer to the question suggested. We believe it was within the scope of proper cross-examination, and under the facts presented was material and pertinent to the inquiry.**

**(f) The respondent testified that the agreement existing between Galiger and Clymo, on the 27th of March, was carried out as it was agreed upon, so far as he knew, and the question was then put to him on cross-examination:**

**“Well, you do not know whether it was carried out at all or not?”**

**Mr. Maury: Objected to as improper cross-examination. It was not gone into with this witness at all.**

**Mr. McHatton: Here is an instrument offered in evidence, and admitted, and I am entitled to cross-examine this witness in reference to it.**

**The Court: The objection is sustained.**

**To which ruling of the court defendant then and there asked for and was allowed an exception."**

**Transcript, page 86.**

**This examination, we submit, was proper, it bore on the question as to whether the note and agreement sued on was a nullity or not.**

**(g) This question was then asked of plaintiff upon cross-examination:**

**"There has been introduced in evidence here this paper, marked plaintiff's Exhibit 'A' (note). I will ask you if you do not know that other parties than Galiger and Clymo obtained an interest in this property and had dealings with the bishop after this time, with reference to it?**

**Mr. Maury: Objected to as not proper cross-examination. Objection sustained."**

**Transcript, page 86.**

**This inquiry went to the question as to whether or not the Galiger and Clymo lease and bond was changed. It was an inquiry that went to the conditions of the note, a performance of which was essential to authorize a recovery.**

**(h) The respondent was asked the following question:**

**"Do you recall what share of the profits you were to receive in the Gallwey deal, if it had gone through?"**

**Mr. McHatton objected to this question and the**

objection was overruled, and the witness answered as follows:

"He offered me \$25,000 for my share of the partnership in the Burke and Balaklava and asked me if I would take it."

It seems that efforts were made to handle the property through Mr. Gallwey and others. The record disclosed we believe, that some kind of an option was given to Mr. Gallwey and his associates, or at least that repeated talks were had with him as to disposing of the property. We presume, although it is not apparent from the record, that the plaintiff advised Mr. Gallwey that he was in partnership with the defendant, and we presume with Kerrigan, and Mr. Gallwey advised plaintiff that he would purchase his interest in the partnership and would give \$25,000 for that interest. This evidence was clearly incompetent. It was hearsay in the most objectionable form, and that it was prejudicial is apparent. Such evidence would naturally bring to the attention of the jury that this interest, which was transferred into services to meet the exigencies of the case, had an enormous value.

(i) Equally incompetent, we contend, was a statement by Kerrigan as to the amount of the purchase price that was coming to the Roman Catholic Bishop.

Transcript, page 148.

This evidence was calculated to give an erroneous idea to the jurors as to the value of the services for which recovery was sought. We contend that the purchase price of the property, or the profits realized by appellant, were matters entirely beyond the scope of the controversy. It could be no defense, and the appellant would not be permitted to show, that the speculation resulted in loss. Whether the deal was profitable or otherwise, the respondent was entitled to receive the reasonable value of his services.

(j) Mr. Clymo at this time was beyond the state. It will be recollected that at the commencement of the trial, an application was made for a continuance on account of his testimony. The stenographer who reported the testimony in the case where an effort was made to establish a partnership, testified that he made a correct transcript of Mr. Clymo's testimony, and having this testimony before him he was asked the following questions:

"Q. Did he have anything to do with the fixing of the price of this property referred to?"

"By Mr. Maury: It is not shown that Mr. Clymo is dead. It is simply hearsay evidence.

"Mr. McHatton: We have shown that Mr. Clymo is absent in California.

"The Court: I will sustain the objection. It has been established that Clymo is absent in California."

An offer of testimony was then made contradictory of the testimony of plaintiff. The matters to which the offer referred were material and important. They referred to the acts done constituting the services for which the suit was brought. The offer was excluded, as likewise the entire testimony of Clymo, which was afterwards offered.

Transcript, pages 367, 369 to 373, 385 to 437.

We insist that the exclusion of this evidence is error.

Section 7887 of the Revised Codes, subdivision 8, provides that the testimony of a witness out of the jurisdiction given in a former action between the same parties and relating to the same matter, may be used.

Section 6380 of the Revised Codes, provides as follows:

"The report of the stenographer, or stenographer pro tempore of any court, duly appointed, when written out in long hand writing or printed in type and certified as being a correct transcript of the testimony and proceedings in the cause, is a prima facie correct statement of such testimony and proceedings."

While it is true that in the former action, the plaintiffs were Kerrigan and the respondent and the defendants were appellant and his wife, the facts in the offer of testimony were directly in issue, and the offered testimony shows that a cross-examination of the witness took place.

The question for consideration is that the party

against whom the evidence is offered had an opportunity of cross-examination.

Cyc. Vol. 16, p. 1091.

Complete mutuality or identity of all the parties is not necessary to admit testimony in the former suit. It generally suffices if the issue be the same and the party against whom it is offered had full opportunity of cross-examination.

Closson v. Barbancy, 7 Rob. 438.

In the case of

Fredericks v. Judah, 15 Pac. 305, (Cal.)

the testimony of a deceased witness, given in an action brought by the executrix of the estate, of which defendants were heirs, against the plaintiff as lessee of the property, was held to be admissible in a subsequent action between the plaintiff and the heirs on questions of tenancy, and adverse possession, the issue being as to whether the plaintiff held the property as tenant or as his own. The rule is laid down by

Greenleaf, Chap. 10, Sec. 163,

as follows:

“But where the testimony was given under oath, in a judicial proceeding, in which the adverse litigant was a party, and where he had the power to cross-examine, and was legally called upon so to do, the great and ordinary test of truth being no longer wanting, the testimony so given is admitted, after the decease of the witness, in any subsequent suit between the same parties. It is also received, if the witness, though not dead, is out of the jurisdiction.”



And the same author, further discussing this proposition in section 164, announced the rule as follows:

"The admissibility of this evidence seems to turn rather on the right to cross-examine, than upon the precise nominal identity of all the parties. Therefore, where the witness testified in a suit, in which A. and several others were plaintiffs, against B. alone, his testimony was held admissible, after his death, in a subsequent suit relating to the same matter, brought by B. against A. alone."

See likewise

Philadelphia, W. & B. R. Co. v. Howard,  
13 How. 307.

Morehouse v. Morehouse, 17 Abbott (N. C.)  
407.

Rucker v. Hamilton, 33 Ky. 36.

Jones v. Wood, 16 Pa. St. (4 Harris) 425.

Yale v. Comstock, 112 Mass. 267.

(k) The appellant was asked the following questions, and the court's ruling in reference to them constitute specifications of error ———.

"Q. What was this paper offered in evidence for, if you know?

Mr. Maury: Objected to as immaterial and irrelevant and calling for a conclusion both of fact and law and calling for the opinion of the witness.

The Court: The objection is sustained.

To which ruling of the court, defendant excepted."

"Q. Let me ask you if it was not offered in evidence as a part consideration for the partnership?

Mr. Maury: Objected to as leading and also as calling for a conclusion of fact and law, and the opinion of the witness.

Objection sustained, to which ruling of the court, the defendant excepted."

"Q. Was it offered for the purpose of showing any liability on your part in that case?

Objected to as leading and calling for a conclusion of fact and law and calling for an opinion of the witness.

Objection sustained. Exception taken by defendant."

"Q. Can you state for what purpose it was expressly offered?

Mr. Maury: Objected to as being an involved question and calling for a conclusion of fact, and it not having been shown that there was any express purpose in offering it.

Objection sustained, to which ruling of the court the defendant excepted."

"Q. It is charged in this complaint that he (meaning you) has refused to make any accounting, though he has acknowledged in writing and agreed to pay plaintiff O'Meara, the sum of twelve thousand dollars when the payment shall be made by Galiger and Clymo. Do you know what that refers to?"

Mr. Maury: Objected to as irrelevant and immaterial.

The Court: I will sustain the objection.

To which ruling of the court, defendant duly excepted.

Mr. McHatton: We offer to show that it referred to this agreement.

Mr. Maury: We object to the offer as being an offer of irrelevant and immaterial evidence.

The Court: The objection is sustained.

To which ruling of the court, the defendant excepted.

Transcript, pages 164-167."

"Q. Do you know whether he contended in the trial of the other case that you were liable to him on that note?

Mr. Maury: This is objected to as incompetent, irrelevant and immaterial and as calling for a conclusion.

The Court: The objection is sustained.

To which ruling of the court defendant then and there duly asked for and was allowed an exception."

Transcript, page 184.

"Q. You may state whether upon the trial of the other case, he claimed you were responsible to him on the note?

Mr. Maury: Objected to as being a repetition, and the court has ruled on that three or four times against counsel.

The Court: The objection is sustained, to which ruling defendant excepted."

Transcript, page 185.

These questions are grouped, because in their consideration, the same general legal principles are involved. Their purpose was to show the position of respondent at other times at variance with the position that he was then maintaining. The note sued on was the subject of discussion, and the object of the interrogatories was to show that at another time the plaintiff claimed that the note represented a share in the profits of the partnership transaction, and did not represent a liability on account of services that were performed. If this is true, and this fact could be established by the questions propounded, the questions should have been answered.

Section 8025 of the Revised Codes provides that a witness may be impeached by evidence that he has made at other times statements inconsistent with his present testimony. This section was considered in the case of

State v. Burrell, 27 Mont. 285,

when the court said:

"Owing to the frequency with which able counsel raise the point, and contend for it in this court, that when, on cross-examination, a witness is asked if he has not at other times made statements inconsistent with his present testimony, he must have related to him, before an answer is required, the circumstances of time, place, and persons present, we find it now proper to say that it is not always necessary to make such relation to the witness. If such a question be asked without reference to such circumstances, the question is proper. If, in answer to a question so put, he deny that he has made any inconsistent statements, or say that he does not remember, that ends the matter; and he cannot be impeached by a production of evidence that he has done so, for the reason that a proper foundation for such impeaching evidence has not been laid. (Section 3380, Code of Civil Procedure.) Before such evidence may be introduced to contradict him, common justice and ordinary fairness demand that he have his memory aided by such relation of such circumstances, and that he be allowed to tell and explain exactly what he did say, if he said anything apparently or at all inconsistent at other times. If counsel intended to go further, and to bring in evidence of such inconsistent statements, if the witness deny them or say he does not remember, then, and only then, is it necessary to lay such a foundation. These remarks, of course, are not intended to apply to admissions or declarations of a party as evidence against such party."

The questions propounded were proper and the objections which were made to them should have been overruled.

(1) Mr. Berkin, a witness for the appellant, testified that the services performed by the respondent were worth, in his judgment, \$100 and

upon cross-examination he was asked the following question :

"Q. There is no price which you can fix on the value of services in the promoting of property, in the sales of mining property?"

This question was objected to and overruled and an exception saved.

"A. No, sir, you cannot set any price on promoting properties."

Transcript, page 226.

"Q. Suppose he were not hired, but were working jointly with the other, or another, who was promoting a sale, and that there was no agreement as to the exact amount of compensation. Have you any way of fixing the value of his services?"

Mr. McHatton: Objected to on the ground that the question is improper, in that the testimony shows that he was not operating jointly with McDermott in this case; that the plaintiff himself testified that when the Gallwey and other lease fell through he was not entitled to any wages up until that time, and that the testimony shows that he was not working jointly with the defendant but that he went there at the request of the defendant.

The Court: The objection is overruled.

To which ruling of the court defendant then and there duly asked for and was allowed an exception.

A. Well, as I stated, if the party was jointly and equally interested in the property, it would be different entirely. There is no way of determining that one should have more than the other, if they are jointly and equally interested."

Transcript, pages 227-228.

The purpose of these questions is too apparent

to need comment. It was to create the impression that the respondent in some way was to have his compensation measured by the profits realized on the deal.

As we have already contended the profits were entirely foreign to the controversy then on. In the suit which was originally brought, where the partnership was attempted to be established, this question was disposed of, and the respondent in the case then on trial was only entitled to the reasonable market value of the services rendered. It seems to us that it was highly prejudicial to inject into the case, over objection, the fact that in some way or other the respondent should be considered jointly interested in the deal, and that his compensation should be measured by the money which McDermott was making out of the transaction.

We have reviewed only a fractional part of the rulings which appear in this record in relation to the admissibility of evidence, and while we do not claim that a single ruling by itself is prejudicial to the extent of warranting a reversal of the case, we do claim that these rulings, unalterably against the appellant, excluding some testimony here and admitting some testimony there, so resulted that the jury was justified in thinking that instead of the reasonable value of the services being the standard for their government in damages that were to be assessed, if any, they were at liberty to consider

the respondent as interested in the deal and fix his compensation according to the profits realized.

(m) Upon the submission of the evidence, a request was made for special findings.

Transcript, pages 455-457.

This request was denied, and a motion was then presented requiring the respondent to elect on which cause of action he would stand. This was likewise denied.

Transcript, page 458.

While it is true that a compliance with these requests on the part of the court was discretionary, to some extent, we submit that if ever a case was tried where these requests should be granted, it was this case.

The appellant was entitled to know whether the verdict of the jury would be based on the written instrument sued on, or whether it would be based on the quantum meruit claim.

Section 6758 of the Revised Codes provides that a special verdict may be rendered, and in the light of the divergent statements made, the respondent, in one breath relying upon a partnership liability, and in the next breath claiming compensation for services regardless of partnership liability, we believe that it was a proper case for the submission of a special verdict. We also believe that the respondent should have been compelled to elect, upon the termination of the case and when the evi-

dence was all submitted. It would not impose any hardship upon the respondent to declare upon which cause of action the liability of the appellant rested. We insist that this election should have been ordered on the authority of the following cases:

Arthur v. Campbell, 13 Ky. Law Rep. 734.  
Hutt v. Hickey, 29 Atl. 456.

**ELECTION OF REMEDIES:** Under the facts as they existed, the doctrine of an election of remedies has application to the respondent seeking to establish a liability on account of the existence of a partnership relation so as to recover a share of the profits, and he is now estopped from maintaining this action for the value of the services rendered.

This question was involved by the answer setting forth the institution of the suit to establish a partnership, and its adverse determination. This being true, the court erred in excluding the judgment roll.

Transcript, page 438.

The rule that we are now invoking is forcibly stated in the case of

Thompson v. Howard, 31 Mich. 308,

as follows:

“A party may not take contradictory positions and where he has a right to choose one of two modes of redress, and the two are inconsistent that the assertion of one involves



the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge or means of knowledge of such facts as would authorize a resort to each will preclude him thereafter from going back and electing again."

A case analogous to the present one is

*Sacker v. Marcus*, 86 N. Y. Supp. 83.

There an action was brought on a contract, on the theory that it created a partnership, and the court held that the plaintiff was bound by his election, and that he could not sue on the same contract on the theory that it was one of employment.

**ERRORS IN INSTRUCTIONS:** Instruction No. 1 is erroneous. It is misleading and is inapplicable to the facts shown to exist. Under the evidence the court should have instructed the jury that the payments were not made as provided for in the lease and bond, and the question, under the proof, should not have been submitted as to whether the payments were substantially made.

Instruction No. 2 is misleading. It practically told the jury that if the instrument sued on was delivered to the respondent it belonged to him. The evidence was conflicting as to the circumstances attendant upon the delivery of this instrument, and the jury should have been advised that if the delivery was conditional, the performance of the conditions was necessary before ownership vested.

Instruction No. 3-a, as submitted, should have been given.

Transcript, page 460.

It was based upon the evidence of respondent. He restricted his claim for compensation to the services performed in connection with the Galiger and Clymo lease and bond and this lease and bond was given on the 2d of February, 1907. The respondent testified that he was not claiming for any services except those rendered in connection with the Galiger and Clymo lease and bond. This instruction was modified so as to place no limit as to time within which the services were rendered.

Instruction No. 6-a should have been given as requested. The modification as made permitted the jury to find for the respondent on the first cause of action, even though they found from the evidence that he had been paid in full for the services that were rendered by him. The instruction is palpably wrong. By it the jury were told that even though the plaintiff was paid in full for the services that he performed, and for which the action was brought, they might, nevertheless, find against the appellant on the first cause of action.

Instruction No. 8-a should have been given. We have already stated our views fully as to the failure of the respondent to show a compliance with the conditions expressed in the note, and without which no right of action existed. This instruc-

tion was expressive of that principle and should have been given.

Instruction No. 9-a is a correct statement of the law applicable to the facts before the jury and should have been given.

Instructions Nos. 10-a and 11-a ought likewise to have been given, because the matters to which they refer were not incorporated in the instructions that were given to the jury. The case was submitted, leaving the jury to conjecture what the law was.

Instruction No. 18-a should have been given. We have already discussed the incorrectness of the court's rulings on the admissibility of evidence showing the profits which appellant made. The second cause of action had to do with the reasonable value of the services rendered. This value should be determined regardless of what the profits might be. We believe that it will be conceded that this is the true rule and the instruction we are now considering correctly stated the law and should have been given. It would have had a tendency to remove the hurtful effect of the evidence referred to, admitted over objection.

Instruction No. 20-a should likewise have been given. There was an irreconcilable conflict in the evidence, and the jury by this instruction would be advised how to proceed in passing upon its credibility.

We believe that all the instructions asked by

appellant contain correct statements of the law applicable to the facts that were developed at the trial, and they should have been given to the jury.

The line of argument pursued by counsel was legitimate and authorized, and should not have been interrupted, and the direction given to the jury by the court to disregard it was wrong. There was evidence before the jury that the suit referred to had been prosecuted, and its institution and prosecution were matters that might pertinently be commented on.

We have heretofore discussed the insufficiency of the evidence to authorize a recovery on either count, and it would serve but little purpose to duplicate the views expressed. We insist that on the record presented the judgment should be reversed and a new trial ordered.

Respectfully submitted,

JOHN J. McMATTON,

JESSE B. ROOTE,

Attorneys for Appellant.

WALSH & NOLAN,

Counsel for Appellant.

IN THE  
**Supreme Court of the  
State of Montana**

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JOHN H. O'MEARA,

*Plaintiff and Respondent,*

*v.*

PETER T. McDERMOTT,

*Defendant and Appellant.*

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RESPONDENT'S BRIEF.

The court will find the record of testimony on this appeal both long and tedious. It is pregnant with repetition. It emphasizes the existence of an aggravated controversy over the legal significance of a few simple facts. These facts must be grasped as an entirety in order that the limitations of law may boldly appear. Fully fortified by the record, and for mutual convenience, we reduce herewith such facts to a simple narrative.

On April sixth, 1906, O'Meara was invited to meet McDermott, a brother-in-law of the Bishop of Helena, at the B., A. & P. depot, Butte,

Montana, by one Kerrigan. After introduction, McDermott said in substance: "O'Meara, you have in an application with the Bishop for a lease and bond on the Burke and Balaklava claims. Now, O'Meara, if you will come in with us, consolidate our interests together, we are going over this morning to the Bishop for an option or lease and bond on the property and we think we shall get it. If you should get it, O'Meara, it is optional with you whether we are in with you or not." To which O'Meara replied in substance: "If I am getting in with you, you may consider my application cancelled, and you may so advise the Bishop when you get to Helena." T. 274. McDermott and Kerrigan then left for Helena. By "we" of course, was meant O'Meara, Kerrigan and McDermott.

Although McDermott did not succeed with the Bishop till the following October, T. 46, the three, in the interim, canvassed for a purchaser notwithstanding, T. 143, and O'Meara then actually introduced Hall, who subsequently became the potent factor in the turn. T. 259.

When the option was obtained, Mr. McDermott hastened to notify O'Meara, saying in substance: "We have the option; get busy." T. 44.

Prior to the conversation at the depot

O'Meara had had a lease on the property, had worked it, and become familiar with it. T. 48, 275-285. McDermott was a traveling salesman, while O'Meara and Kerrigan were practical miners.

From October on, each gave his services in the manner of an ordinary promoter towards turning the property for a profit. O'Meara advanced McDermott small sums of money, without question, for incidental trips. T. 98. McDermott essentially guided and instructed, while O'Meara obeyed. Little was said as to their legal relation. O'Meara assumed from what was said that he was an equal partner in the option with McDermott and Kerrigan. McDermott kept his own counsel as to his relation with the Bishop, and inspired confidence in his associates with a generous use of the pronoun "we."

Their efforts, meeting with varied vicissitudes, were finally crowned with success in the following March, when McDermott announced the turn, and proceeded to adjust with his associates. McDermott paid O'Meara \$500.00, then \$200.00 on account, T. 349, 350, out of the first installment of the purchase price. McDermott then attempted to adjust with his associates as to the balance due, should all installments be

met. He first prepared and offered his conditional promissory note, which was refused, T. 94, 337. He then prepared and offered his second conditional \$12,000 promissory note, which O'Meara accepted as an incident to the supposed partnership. T. 69, 72, 76.

Subsequently, O'Meara and Kerrigan learned that the deal had been turned for a sum \$125,000 in excess of the option price. They promptly demanded of McDermott further adjustment. McDermott refusing, suit was instituted in the following June in the District Court of Silver Bow County, for an accounting on an alleged partnership against McDermott and wife, and an injunction *pendente lite* was granted to save the partnership money intact, if any. On a final hearing therein, in January following, the relief prayed for was denied. At this hearing, O'Meara learned that no such a thing as a partnership had existed between them; that the Bishop had given McDermott an option on the ground, good from October, 1906, to January 1, 1907; that from February on McDermott was acting as the Bishop's agent in disposing of the property and had been successful through himself and associates, and that as such agent, he had a right to expect a large commission from the Bishop.



O'Meara thus learning that he had never been a partner with McDermott, promptly instituted the present action. His first count is based on the second conditional \$12,000 promissory note, made out in the handwriting of McDermott and delivered as aforesaid. His second count is based on a *quantum meruit* for services rendered in and about the sale of the Burke and Balaklava claims, at the value at which McDermott himself had set them in an attempt at a *quasi* friendly adjustment.

McDermott, answering, set up as defense to the first count: (A) Want of consideration for that O'Meara had promised for himself and Kerrigan, a full acquittance to McDermott in the premises, and had failed to comply. (B) Non-acceptance of the note by O'Meara. (C) Condition not performed. And (D) Prior adjudication. And to the second count (A) General denial; and (B) prior adjudication. By reply, O'Meara took issues with such defenses. and on proof adduced, the jury found for O'Meara.

We submit that O'Meara's lulled ignorance of his true legal relation with McDermott, and McDermott's change of front on wealth acquired, are the causes for the call on the courts in the premises.

We feel justified in saying, from the record of testimony herein, that natural right and justice is on the side of O'Meara, and we feel further justified in stoutly asserting that the proper measure of the value of O'Meara's services is the sum of \$12,000, being the very amount McDermott personally thought them worth, when voluntarily adjusting with his associates, and at a time when McDermott was not altogether prejudiced against the value of O'Meara's services in the premises. That the trial court and jury so felt, therefore occasions us no surprise.

Appellant's statement of the case is terse and unsatisfactory because incomplete. This is due, perhaps, to the fact that the counsel who wrote the brief did not try the case. To avoid prolixity, but without waiver of any such defect, we will endeavor to weave in the deficiency on argument of the various points. Alleged errors committed at the trial are numerous, but of this, opposing counsel are magnanimous enough to say, B-34, "that many are devoid of merit." We regret opposing counsels' childish insinuation in this connection, that the record shows uniform rulings in O'Meara's favor. We suggest, in extenuation, however, their absence from the trial, and we also suggest the happy coincidence that the record is not further burdened

with rulings adverse to O'Meara, and with those in favor of McDermott. We content ourselves, therefore, with an effort at answering only those errors which opposing counsel have seen fit to treat and follow consecutively the order of their arrangement thereof in the brief.

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### ARGUMENT.

Appellant's principal contention, with reference to the first count, is an asserted complete failure of proof as to the happening of the condition of the promissory note. This assertion is unconscionable. The lease and bond referred to in the note gave Galinger and Clymo the right to purchase the property, T-116, within forty days from the date February 2, 1907, for \$375,000; or for \$400,000, payable in installments as follows: Within forty days from date \$85,000; within three months thereafter \$157,500; and within three months thereafter \$157,500. The forty days elapse apparently without any payment thereunder. On the 23rd of March following, the lease and bond was supplemented, T-101, 103, by an escrow agreement and deed, deposited with the First National Bank of Butte, with instructions to deliver to Galinger, upon the payment of \$85,000 cash, \$157,500 on June 14, 1907, and \$157,500 on September 14, 1907.

The lease and bond and escrow agreement were again supplemented, T-103, by another agreement between the parties, of date June 14, 1907. This agreement, for a consideration, extended the time for further payments, and contained this pertinent clause:

"In case such payments are so made, including interest as above specified, the same will be accepted as full compliance with the terms of said escrow memorandum, and of the lease and agreement, pursuant to which the said deed was deposited in escrow." T. 104.

The last payment of the \$400,000 was met September 12, 1907. T.-105.

Now, it follows, that when McDermott delivered to O'Meara the note in question, to-wit, March 27, 1907, he had already placed himself in a position unbeknown to O'Meara, where he might at all times say and pretend to O'Meara, as even on this appeal, that payments were not met as limited in the lease and bond. In other words, McDermott had worked out a situation where, if the lease and bond and days of actual payment of the purchase price alone were considered, he possessed a technical defense to the note. But McDermott and opposing counsel wholly overlooked the fact that when McDermott gave O'Meara the note, the previous specifications of payment were even then merged

into those of the escrow agreement, which changed the dates of payment, and fixed the final payment at September 14, 1907. In law, of course, McDermott intended and gave the note with reference to the then condition of the lease and bond. The fact also remains that the specifications of payment were subsequently changed by the agreement of June 14, T.-103-4, and that the purchaser in part availed himself thereof, yet the purchaser met the balance of the purchase price within time, on September 12, 1907, and thereby clinched for every one interested in the lease and bond, McDermott's solemn agreement that such payment should be in full compliance with the terms of the lease and bond. T.-104. That under such circumstances, McDermott should now say that such full compliance did not apply to O'Meara, is what we think unconscionable. McDermott and his counsel are attempting to violate every maxim of jurisprudence. Under such circumstances, McDermott plainly estopped himself from thereafter asserting that there was no compliance with the lease and bond to anyone whatsoever.

The court will observe that the note recites: "Payments shall be made subject to the conditions and agreements of the existing lease and bond held by Messrs. Galiger and Clymo \* \* \* \$6,000 shall be paid upon completion of second

payment on said lease and bond. \* \* \* The balance \$6,000 to be paid not later than ten days after the completion of the terms of said lease and bond, and the fulfillment thereof"; and from the evidence that McDermott never permitted the lease and bond to lose its existence. The court will further observe, from the circumstances attendant upon the giving of the note, and from the note itself, that it was McDermott's cardinal intent that there should be no payments on the note, unless there was payments of the purchase price, and then accordingly. But, and notwithstanding the tenor of the note and the evidence, opposing counsel lay stress on the concluding paragraph of the note: "Failure to meet payments as specified in said lease and bond agreement, nullifies this note." Opposing counsel assume that the words "as specified" are synonymous with the words "as limited." Counsel then proceed to argue as if the only two essential facts necessary to a determination of the question are (a) the dates of payment limited in the lease and bond as drafted; and (b) the dates of actual payment thereunder; and conclude, since the dates varied, that the note was nullified. Counsels' patent error lies in assuming that the note was left standing at the post, while conceding that the lease and bond was carried on to victory. The

contrary is true. The note by its nature and intent was an incident of, and inseparably connected with the lease and bond, made so by McDermott, and necessarily moved along, as did the lease and bond, itself. Now, the function of the lease and bond was confessedly fully performed, and thereby the vitality of the note was preserved.

The following rules and maxims are applicable:

“A condition in a contract, the fulfillment of which is impossible or unlawful, within the meaning of the article on the object of contracts, or which is repugnant to the nature of the interest created by the contract, is void.”

4905 Rev. Codes.

The condition of meeting the payments at the times specified in the lease and bond according to its tenor was rendered impossible through actual lapse of time,—the 40 days having passed without a payment,—when McDermott deliberately executed and delivered his note to O'Meara. Such a condition was therefore void, and the last paragraph of the note should be considered a nullity if the court should take it to mean, as opposing counsel contend, that it calls for proof showing payments strictly within the times specified in the lease and bond. The law applicable to the present condition is thus stated:

"When the impossibility is known to the promisor at the time of making his promise, but not known to the promisee, he must be taken to have intended to make himself absolutely liable."

9 Cyc., 627 and 639.

"A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done, without violating the intention of the parties."

5033 Rec. Codes.

"A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates."

5036 Rev. Codes.

"In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party."

5043 Rev. Codes.

"Time is never considered as of the essence of a contract, unless by its terms expressly so provided."

5047 Rev. Codes.

"One must not change his purpose to the injury of another."

6180 Rev. Codes.

"He who consents to an act is not wronged by it."

6183 Rev. Codes.



It must appeal to the court ere this, that opposing counsel are not dealing fairly with the record. It is therefore not necessary to comment on their authorities cited in this behalf for that reason.

We cannot, however, overlook opposing counsels' peevish attack on our reply, to the effect that its averments are "absolutely meaningless." its averments were that if the terms of the lease and bond were not met, McDermott had caused them not to be met and consented thereto for the express purpose of defeating his contract with O'Meara, and therefore, should he be estopped from asserting that *the* or *any* payments were not met, as specified in the lease and bond. We think the court will rather say that such averments were absolutely appropriate in the light of McDermott's general conduct, as disclosed by the record. The propriety of such averments should have become manifest to counsel on perusal of their cited Bagley-Cohen case, had they examined it sufficiently well to advise the court of its import. The court should read the reported case to avoid any erroneous impression. The only case we think of hitherto before the court, at all resembling the present, and the particular point we are now considering, is that of *Noyes v. Young*, 32 Mont., 226. At page 237 thereof, the court said:

"Had the defendant prevented the contingency from happening, and plaintiff had brought suit alleging bad faith on the part of the defendant, the question would then be presented."

In conclusion, we therefore feel most confident that the trial court did not err in overruling the motion for a non-suit on the first count. On the contrary, we say that had the question of want of consideration not been in issue, the trial court would have been justified in peremptorily instructing the jury to return a verdict for the plaintiff thereon.

## 2.

To the second count, counsel interpose the objection that O'Meara's services were rendered in connection with the sale of mining claims, and that no written agreement existed therefor. This objection is now raised for the first time. The record is barren of even an intimation that such an objection was thought of in the trial court. Hence, it is now too late to raise any such objection in the supreme court.

All authorities.

In the case of *Christiansen v. Aldrich*, 30 Mont., at page 453, the court very pertinently and conclusively say:

"The statute is not pleaded, and, so far as the record shows, the defendants did not

in the district court rely upon it. They cannot now avail themselves of this defense."

Furthermore, the suggestion that no written agreement existed is entirely gratuitous on the part of opposing counsel. The record does not anywhere disclose whether such agreement between O'Meara and McDermott was in writing or not. It is equally gratuitous for us to say that probably there were no writings between O'Meara and McDermott in the premises.

That opposing counsel should feign an issue is, we think, sufficient reason for ignoring their authorities cited in support thereof.

It is very well taken that a verbal agreement authorizing or employing an agent or broker, to purchase or sell real estate for compensation or a commissin, is invalid, but it is further suggested that, if desired as a defense to a claim for services rendered in and about the sale of real estate, advantage must be seasonably taken thereof or the legal advantage is lost or waived.

"A party to a contract within the statute of frauds has the right, if he choose to exercise it, to waive the protection of the statute, and thereby make the contract binding. He cannot be compelled to avoid his contract, and, therefore, neither the court, nor a stranger to the contract, can interpose the defense of the statute for him. \*

\* \* And one who fails to rely upon the statute when he has the opportunity to do so, cannot thereafter shield himself from liability upon that ground."

29 Am. and Eng. Enc. of Law (2nd Ed.)  
811.

"And of course, the statute affects only the remedy of the party sought to be charged."

29 Am. and Eng. Enc. of Law (2nd Ed.)  
999.

In this case, there was no advantage taken of the point whatsoever. A clear cut objection to the introduction of evidence relating to the services rendered by O'Meara as a promoter, to the value of such services, to the compensation McDermott received from the sale, and to other kindred matters complained of by opposing counsel, based on the theory that a suitable written instrument was necessary to warrant a recovery therefor, a call for such instrument, a ruling from the court that it was not necessary, an exception duly noted and preserved, would have given this court an opportunity to review such a ruling on the part of the trial court. Such evidence was clearly within the issues of the pleadings. The trial court had therefore no right to exclude such evidence, unless the defendant should insist on the enforcement of the statute, and the defendant not urging the exclusion of the evidence on that ground, would

naturally lead the trial court to infer either that such agreement between O'Meara and McDermott was in writing, or if not, then that McDermott was high minded enough not to claim the benefit of the statute. It has never occurred to us that it was the province of a court in any case, to make defenses for a defendant, unless thereto directly importuned upon good cause shown. It is not at all apparent from the record how the trial court would have ruled had it been afforded an opportunity, on a clear cut objection to this sort of evidence for the cause now assigned. It is possible that the trial court would have ruled in defendant's favor, and a large portion of the present transcript would thus have been dispensed with, as well counsels' grumblings that the trial court ruled uniformly in O'Meara's favor in the premises.

We trust that opposing counsel will not think, from what has been said, that we think that the statute of frauds might have been a factor in the case if availed of, since the opposite is our view. McDermott had gotten O'Meara's services for nothing. The statute says unless the agreement for such services be in writing, duly signed, the agreement is invalid. The statute was intended to prevent fraud, and not to further it. To one in the situation of O'Meara, the courts have long since pointed out the course

to be pursued and that is, a count upon a *quantum meruit*. For so simple a point, we judge one eminent authority should suffice.

“One who has rendered services in execution of a verbal contract which, on account of the statute, cannot be enforced against the other party, can recover the value of the services upon a *quantum meruit*.”

Browne, Statute of Frauds, (5th Ed.)  
page 145, and cases cited.

Nor does the particular sub-division of our statute of frauds under discussion, apply to verbal agreements between brokers to co-operate in making sales for a share of the commissions.

Gorham v. Heiman (Cal.), 27 Pac. 289.

Nor is it essential to the validity of an agreement made by parties to share in the profits of a contemplated speculation in real estate that it should be in writing.

Jones v. Patrick, 140 Fed. 403.

## ALLEGED ERRORS IN RULINGS OF COURT.

Under this title, appellant scantily treats errors denominated "a" to "1" inclusive, Brief 35-50, and then concludes:

"We have reviewed only a fractional part of the rulings which appear in this record, in relation to the admissibility of evidence, and while we do not claim that a single ruling by itself is prejudicial to the extent of warranting a reversal of the case, we do claim that these rulings unalterably against the appellant, excluding some testimony here, and admitting some testimony there, so resulted that the jury were justified in thinking that instead of the *reasonable* value of the services being the standard for their government in damages that were to be assessed if any, they were at liberty to consider the respondent as interested in the deal, and fix his compensation according to the profits realized." (Brief 50.

Now, our answer to such conclusion is that if counsel feared the jury would so take the evidence, then counsel should have seen to it that the jury were suitably instructed on that point; and this was done in so far as reasonable value of O'Meara's services were concerned. Instruction 6-A; T. 23. But in so far as the element that the jury might also consider that O'Meara was in the deal, and entitled to share in the profits correspondingly, we say that O'Meara

had limited himself to a \$12,000 recovery, by virtue of his complaint, and that such limitation was about the only limitation that the law would put upon the jury in the premises pursuant to the issues involved.

We further answer particularly counsels' alleged errors, for the purpose of showing that their conclusion is unwarranted:

(a) We adopt counsels' argument as ours, eliminating only the element that the statute of frauds is in the case.

(b) McDermott was fully permitted to answer the question, though the objection thereto was sustained. T. 168. Hence no error.

(c) Appellant's objection to the offer of the note was clearly insufficient. Counsels' added suggestion that performance of the condition should have been first shown is also just as insufficient since the order of proof was a matter within the discretion of the trial court.

(d) O'Meara was permitted to say what his services were worth relative to the sale of the mining claims. T. 57. Counsel now say that the court erred therein, basing their assertion on four authorities which are in no wise in point. That opposing counsel thought such testimony was in the nature of expert testimony,



and that the trial court needed light thereon is clear from the fact that they put on their experts, Berkin and Donohoe, and examined them fully in the matter. T. 223, 228. However, the evidence was competent and is so conceded by the authorities. For a collation thereof see 17 Cyc. 116. In the case of *Mercer v. Vose*, 67 N. Y. 56, the plaintiff was asked a similar question with reference to the value of his services, rendered in and about the collection of certain difficult accounts. On appeal, and in speaking on this very point, Earle, J., said:

"I can conceive of no case where one who has himself rendered a service to another, when he will not be competent to give evidence of its value. Knowing the precise nature of the service rendered, he must have some knowledge of its value, and he is thus competent to give his opinion. It may not be worth much. Its weight, however, is for the jury."

The above remarks of Judge Earle have frequently been cited with approval by other courts from that time to this.

(e) O'Meara having answered that he sued as a partner in the former suit, was asked on cross examination if he were not suing for the same services he was then testifying about. On objection, the answer was properly denied, as calling for a legal conclusion, T. 59. However,

it was subsequently wormed from the witness.  
T. 63.

(f) Here it is claimed that O'Meara should have been compelled to answer whether he knew or did not know that the Galiger-Clymo agreement had been carried out. He proved that it had been by Weirick subsequently, but he had offered no proof on his own part at the time the question was put to him, as to whether it had been carried out or not. The carrying out of the agreement was shown subsequently to have been done by transactions out of his presence, and as to which he had no knowledge. He was called upon to give an opinion of the legal effect of written instruments, on what constitutes the fulfillment of an instrument, and on the credibility of witnesses, which he subsequently intended to put on the stand. It was also cross examination upon matters not in his testimony, nor alluded to by him.

(g) Again, on cross examination, O'Meara was asked with reference to his exhibit "A," the note, if he did not know that other parties than Galiger and Clymo obtained an interest in the property, and had dealings with the Bishop with regard thereto, after the date of the note. Now the court may possibly have erred in sustaining the objection on the ground stated, that

it was not proper cross examination, but it was immaterial since the court could readily see that any knowledge O'Meara might have of the change of parties in the shape of Galiger and Clymo assigns, after execution and delivery of the note, could not affect O'Meara's interest in the note in the least. Furthermore, from the whole record, it is apparent that the only answer O'Meara could have made was that he had heard that there had been changes, and hence hearsay.

(h) This was a question asked on re-direct examination of O'Meara, about a matter which McDermott's counsel brought out on cross examination. The Gallwey-Kelley-Higgins deal was first alluded to by counsel for McDermott, T. 88, and they cross examined on it vigorously after its injection into the case.

(i) The argument on this error claimed is addressed to the proposition that it was not permitted to let the jury know how much McDermott was going to get out of the deal; but, evidently, what the Bishop was going to receive, had nothing to do with what McDermott was going to receive, and later, when the testimony was offered as to McDermott's share, it was not objected to, T. 154. We assert here, that under the pleadings and the law of evidence ap-

plicable thereto, the question was relevant as tending to show what McDermott expected to receive if the deal were turned.

(j) Our argument will be of some length. We preface, however, by saying that "j" is one of the points, which, standing alone, opposing counsel concede, would not warrant a reversal. Brief 50. We concur. It refers to the exclusion of Clymo's testimony, and the mere statement should preclude even the possibility for an error. The court should not consider the assignment. There is entire failure to observe Rule X, Subd. b.

After the jury was empanelled, appellant moved for a continuance on the ground that their important witness, Clymo, was in California. No affidavit was offered; merely counsels' word. The court denied the motion, T. 37. And we are pleased to note that opposing counsel do not question the propriety of the court's ruling. On putting in his defense, the defendant came to the point of testimony given in the partnership suit. Without objection, the stenographer who took the evidence on the preliminary hearing for an injunction, read from his notes what O'Meara had said thereat, T. 235-6. Then, through the same stenographer, defendant's counsel proved that pages 1-25 of

his notes represented O'Meara's testimony at the final hearing. It was thereupon offered. To which we remarked: "We have no objection whatever. Let the entire instrument be introduced." But it was not read to the jury; merely considered so, T. 237. As embraced in the record it constitutes a pad from pages 238 to 268. Then, at page 367, began the effort to introduce apparently "*into the record,*" rather than *for the consideration of the JURY*, the testimony alleged to have been given by Clymo at the final hearing in the partnership suit. The stenographer stated that he had then taken Clymo's testimony, and had it in his notes at pages 259 to 308, inclusive, T. 367. The stenographer was asked if Clymo was not asked a certain question. The objection thereto was sustained on the ground that the court had not been shown that Clymo was absent in California, T. 368. Defendant's counsel then informed the court that he did not propose to encumber the record with a lot of immaterial matter from Clymo's testimony. The court then suggested, that perhaps, under the statute, all or none of Clymo's testimony should go in.

Wigmore on Evidence, Sec. 2103.

Then, defendant's counsel offered to prove by the stenographer that Clymo had testified to certain particulars in the partnership suit, T.

369. The court sustained the objection to such offer, on the ground of its incompetency, T. 371. Again, the defendant tried to get in, through the stenographer, an alleged assertion made by Clymo in the partnership suit, which was denied by the court as incompetent, T. 372. Then no exception being made, the stenographer was permitted to read the brief excerpt of O'Meara's testimony given at the preliminary hearing. Thereupon, defendant renewed his offer of Clymo's testimony, as alleged to be certified to by the official stenographer, T. 375. The specific objection thereto then was that the stenographer himself was not on hand to be examined with reference to the correctness of his notes, and further that Clymo had not been shown to be absent from the state, T. 376-388. Upon proving the fact of absence, the defendant renewed his offer of Clymo's testimony. To the previous objection that the stenographer should be produced for the purpose of cross examination, as to the correctness of his notes, there was further added, the statutory objection that the former action was not between the same parties, nor relating to the same matter. T. 384. The defendant merely resting on his offer so made, the objection was sustained, T. 384. It may be well to add here that the former action was tried before Judge Bourquin, T. 452.

Now, the court will readily see that the Clymo testimony was properly excluded for the reason that no effort was made to bring it within the following statute, governing the evidence that may be given at a trial:

"The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter."

7887 Rev. Codes, Subd. 8.

It was, of course, the defendant's duty to show the court that the testimony of Clymo offered, was within the purview of the statute. As said by Cyc. 16, page 1094,

"Another condition of admissibility of evidence, given in a former suit, is that the issue in the two cases should be the same, or substantially the same, and the burden is on the proponent to show, either by parole evidence, or by producing the record of the former trial to the satisfaction of the court that the necessary identity of issues exist."

This, therefore, very clearly shows that if error occurred, it was the fault of appellant's counsel, rather than the fault of the trial court.

Furthermore, opposing counsel seem to think that Sec. 6380 of our Rev. Codes, declaring that a transcript of testimony and proceedings, certified to by the official stenographer, is *prima facie* correct, is correct for all purposes. It is not. It

refers merely to the proceedings to be had in the trial court upon settlement of statements, allowances of bills of exceptions, etc.

People v. Woods, 43 Cal. 177;

State v. Shepphard, 23 Mont. 327.

Therefore, the defendant was again wrong in not producing the stenographer on plaintiff's demand, for an examination into the correctness of his notes, etc., when lastly offering Clymo's testimony *en masse*.

Furthermore, it is impossible to tell from the record whether the stenographer's notes, pages 259-308, alleged to be the Clymo testimony in the partnership suit, is all of Clymo's testimony; or whether that, additional, or other testimony is embodied in the record at pages 385 to 437.

Furthermore, there is nothing in the record to indicate whether the defendant intended to use the Clymo testimony in any other manner than as he had used the O'Meara testimony, taken at the same time, to-wit,—*considered as read*," T. 237 The jury were no wiser for the introduction of the O'Meara testimony, and presumptively, would not have been had the Clymo testimony been admitted. Hence, opposing counsel are not far remote from arguing a moot question.

In this connection, it may possibly be urged



by opposing counsel that the trial court might have gleaned at this stage of the case, through scattering remarks of witnesses and counsel, and the peladings, that the former action was between the same parties, relating to the same matter. Now our answer is that it is for opposing counsel so to show, and that they cannot, for the sum of all would merely show that the parties to the former suit were O'Meara and Kerrigan on the one side, and McDermott and wife on the other, and that the matter was an effort to obtain an accounting on a partnership alleged to exist between O'Meara, Kerrigan and McDermott, backed by an injunction to prevent McDermott and wife from dissipating the funds of the parnership, arising from the turn of the mining deal. The trial court, however, could not have known the issues in the partnership suit, to any certainty, until an examination of the judgment roll subsequently offered in evidence, T. 437-453.

Now, without for a moment thinking that the court will regard opposing counsel as having established the right to have the question considered, whether, in the former action, the parties or the matter were the same, we wish to say, ignoring counsels' authorities cited in this behalf, which may be dispensed with by the word that they are not pertinent to the point,

that the issue in the two actions would not be considered the same by the courts for the purpose of admitting Clymo's testimony if otherwise shown to be competent, and this for the clear reason that

"The issue on the occasion when the former testimony or deposition was given must have been substantially the same, for otherwise it cannot be supposed that the former statement was sufficiently tested by cross examination upon the point now in issue."

Wigmore on Evidence, Sec. 1387.

In the former suit, the supreme effort was to establish a partnership. The suit survived or fell on that particular point, and cross examination of Clymo would naturally be directed to and limited by that end. The present action is in part to recover the reasonable value of O'Meara's services rendered to McDermott in and about the sale of the mining claims. It would be unjust to deprive O'Meara of the right of cross examination of Clymo upon a separate and distinct issue, notwithstanding, in the former suit, the sale of the claims and O'Meara's services rendered in that behalf to Clymo's knowledge, were pertinent matters. The authorities concur in similar situations.

The issue of simple negligence is not substantially the same as that of gross negligence;

hence, testimony given on the issue of simple negligence is not admissible in a subsequent action on the issue of gross negligence.

Schindler v. Mil., etc., R. R. Co. (Mich.), 49 N. W. 670.

Testimony given in a suit by tenants in common for certain aliquot shares in a tract of land, was not competent on a trial for certain different aliquot parts of the same tract.

Norris v. Monen, 3 Watts. (Pa.) 465.

Evidence of a witness since deceased, received on a former trial between A and B relating to a free fishery in a river was held incompetent on an action between A and B relating to a several fishery in the same river.

Melvin v. Whiting, 7 Pick. (Mass.) 79.

Testimony in a suit for personal injury by a minor through his father, as next friend, not admitted in a suit by the father for loss of service caused by the same injury.

Hooper v. R. R. Co. (Ga.), 37 S. E. 165.

The transcript and opposing brief are erroneous in quoting the ruling of the court, to-wit: "I will sustain the objection; it has been established that Clymo is absent in California," T. 368; B. 42. The objection was sustained for the converse,—namely, that it was not shown that Clymo was absent in California. McDer-

mott himself went upon the stand to meet this very ruling, T. 376).

(k) "k" is an argument addressed to alleged errors on the part of the trial court, in refusing to permit McDermott to tell the jury how O'Meara had legally and otherwise stood and claimed with reference to the note in suit on the previous partnership hearings. *State v. Burrell*, 27 Mont. 285, is cited in support thereof, but the court will readily see that opposing counsel have blundered with this authority, as McDermott himself was upon the stand, and not O'Meara, to whom alone the authority would be applicable if at all. The court's rulings are properly sustainable upon the reasons assigned in the objections. The trial court no doubt also saw that the questions elicited quasi-self-serving declarations. We cannot refrain from remarking here, that if McDermott's counsel thought that the jury should know of O'Meara's possible change of front in the premises, then such counsel lost their opportunity by suffering O'Meara's testimony in the former suit to be considered as read, when finally permitted in evidence, without objection, T. 237.

However, counsel seem to assume that if, in the partnership suit, O'Meara had represented his services and the note as evidences of a part-

nership, then once standing, and winning or losing on the issue of partnership, O'Meara would be precluded evermore from a standing on such note, or from a standing upon a *quantum meruit* for such services rendered, or from both, as here. As a legal proposition, we concede the point, had O'Meara won on the issue of partnership, but deny its applicability in the event of defeat, citing in our support the recently decided case of

Kaufman v. Cooper (Mont.), 101 Pac.  
972.

(1) Here McDermott believes himself prejudiced because the evidence was not limited to the value of O'Meara's services, rendered as a common miner. As before suggested, the court could not do so under the pleadings. McDermott denied the existence of any agreement for services or for compensation. O'Meara as a witness, clearly showed that his services partook of the nature of those of a common miner, and also those of a promoter. O'Meara was therefore entitled to recover the reasonable value of his *entire services*. Opposing counsel seem to assume that their mere suggestion in this court that the statute of frauds has applicability to this case, ends O'Meara's right to claim for services rendered as a promoter. Such position is fallacious, as there is no statute prohibiting

the rendering of services as a promoter. The court was therefore right in these rulings. The law of evidence is: Where there is an express contract, evidence of the reasonableness of a commission is not admissible. Where there is a conflict of testimony as to the agreement, evidence of what other agents engaged in the same business at the time received, is competent. And where there is no agreement as to amount, such evidence is admissible to show what would be a reasonable compensation.

10 Enc. of Ev. 40;

Hollis v. Weston, (Mass.) 31 N. E. 483;

Best v. Sinz (Wis.), 41 N. W. 169;

Elting v. Sturtevant, 41 Conn. 176;

Kelly v. Phelps (Wis.), 15 N. W. 385.

(m) Here, opposing counsel urge that the trial court should have caused O'Meara to elect upon which count he would stand, and also should the trial court have given the special findings asked. These matters are discretionary with the trial court, and hence, in the absence of a clear showing of abuse of discretion, this court will not interfere. No abuse of discretion is even hinted at, to say nothing of abuse being actually shown. O'Meara specifically asked for but one judgment, and that for \$12,000. Whether the jury gave the verdict on the one count or the other should be of little moment to McDermott, since discharging the judgment

thereon, it would conclude the O'Meara-McDermott controversy. We say here that the evidence is sufficient to support the verdict and subsequent judgment on either count, particularly so with reference to the reasonable value of O'Meara's services in the premises, as McDermott himself, perhaps unwittingly, had set the reasonable value of O'Meara's services to him, when fixing the amount thereof in the note in suit. The Hutt case cited, scarcely provokes a reply as there, being a decidedly different action, the trial court enforced an election. In considering this appeal generally the court may find *Blankenship v. Decker*, 34 Mont. 292, pertinent.

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### ELECTION OF REMEDIES.

Under this head, opposing counsel urge that since O'Meara fell down on the issue of partnership in the former suit, wherein the note and his services were advanced as evidences of a co-partnership, in and about the sale of the mining claims, he is now estopped to take an inconsistent position. The fact is, that O'Meara was therein defeated because he had mistaken his remedy, and opposing counsel do not pretend to show anything to the contrary. Had O'Meara won therein, or were the partnership suit still

pending, as in the Sacker case cited, appellant's contention might well be tenable; but the contrary being true, the contention is without merit, and McDermott has no legal or logical right to think that his obligations to O'Meara were discharged in such fashion. This court has not long since decided this very point in O'Meara's favor, by the use of the following language:

"It is said that, in bringing this action in claim and delivery, Kaufman elected his remedy and will not thereafter be permitted to pursue another and inconsistent remedy. It is a general rule that, whenever the law furnishes to a party two or more methods of redress in a given case, based upon inconsistent theories, the party is put to his election, and when, with full knowledge of the facts, he makes his selection of the remedy he desires to pursue, such an action is irrevocable and is a bar to his right to resort to any other remedy based upon a remedial right inconsistent with the right first asserted; but there is another rule of law equally well established, which is that if a person prosecutes an action based upon a remedial right which he erroneously supposed he had but in fact he did not have, and he is defeated because of his error, he will not be held to have made an election of remedies and will not be precluded from asserting one which he has, even though it be inconsistent with that which he supposed he had but did not have. These rules are recognized by the authorities generally. 15 Cyc. 252, 262; 7 Am. & Eng. Ency. Law, 361,



366. A review of the history of the first case convinces us that in that instance Kaufman merely made a mistake as to the remedy available to him, and it ought not to be said that by making such mistake the admitted indebtedness of Cooper and Archibald to him was thereby satisfied. The law does not recognize that method of discharging one's liabilities."

Kaufman v. Cooper (Mont.), 101 Pac. 971.

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### INSTRUCTIONS.

On considering the instructions given and refused at the trial, we shall ask the court to bear in mind the fact that the defendant did not challenge by demurrer or otherwise, the right to join in one action a count upon a promissory note and a count upon a *quantum meruit* for services rendered. Failing so to do, the point was waived for the trial, and the right we may here say, was lost to the defendant to insist upon an election at any time through the trial.

Forsell v. Pittsburgh & Mont. Copper Co. (Mont.), 100 Pac. 219.

Also it seems to us, the defendant logically lost the right to complain, should the trial court give an instruction applicable to one count, and not to the other. In the nature of things, the law must vary for either count. Plaintiff might not produce evidence sufficient to support a ver-

dict on either count, or the plaintiff might produce a sufficiency of evidence for one or both counts, as we now contend, since the jury so found; yet in such situation the plaintiff would be entitled to have the instructions limited to each count separately should he so desire, and that without any militation against the other. The defendant cannot complain, as he suffered the situation to come about through failure to take any advantage thereof. The plaintiff no time through the trial so acted as to lead the trial court to believe that the promissory note was treated as but a bit of evidence establishing the fact that O'Meara had rendered McDermott services, and therefore for that reason, merged in the second count. As the evidence was at the close of the case, the trial court was therefore compelled to treat the promissory note in the same capacity in which it was alleged. With these remarks in mind, there appears to be no difficulty in the way of disposing of opposing counsels' contentions with reference to the manner in which the trial court treated the instructions.

To the first instruction given, counsel say that the court should rather have instructed that the condition of the note was not met, than to have instructed that if the condition was substantially met, there could be a recovery on the note. This

was indeed a liberal instruction for the defendant, as we have heretofore shown that the condition was legally, if not literally, met, and altogether, to defendant's acknowledged satisfaction. No court will quibble over the letter when the intent of the parties is satisfied. The court will not overlook the point that the happening or the performance of the condition in this case was largely in the power of the promisor of the note, and not at all in the power of the promisee. Further, will the court have noticed that McDermott so treated the mining premises as if his agency therein was coupled with an interest in the purchase money. This is particularly apparent from the wording of the June 14th agreement, whereby McDermott secured to himself the handling of the purchase money, T. 102.

The comment on the second instruction is hardly worthy of notice. The presumptions are taken from the code. The note necessarily would be O'Meara's, whether the condition was met or not. If the condition were met the note would represent value, otherwise not.

To 3-A is interposed the unjust and unwarranted assertion that O'Meara had limited himself by virtue of his own testimony, to a claim for services rendered after February 2nd, 1907. The record belies the assertion. See Transcript, pages 64 and 65.

To 6-A as offered, there was a modification. The defendant offered an instruction to the effect that if the jury should find that the \$700.00 paid by McDermott to O'Meara sufficed for the latter's services to McDermott, then verdict should be for defendant on both counts. The court modified the same by limiting its force to the second count, and we think the court was right as there was no indication of any waiver of the first count. The only waiver in the case on O'Meara's part was the waiver to recover more than \$12,000 on both counts, and this waiver was specifically expressed in the complaint. T. 9. The court had no right to eliminate the first count unless seasonably requested so to do by the defendant, and this was not done nor claimed to have been done.

Now it may well be that other considerations than services rendered moved McDermott to give the note. The law will presume that there were such other considerations and come to the support of the note in the absence of a decisive showing to the contrary. There was no such showing to the contrary. In fact, we may mention here, that possibly the moneys recited in evidence, as advanced to McDermott by O'Meara for incidental trips, formed another consideration for the note, and the court may have had this very idea in mind when refusing the instruc-

tion as offered. Had the instruction been given as offered, the "palpable wrong" would have been on the side of the plaintiff.

By 8-A refused, defendant asked for a peremptory instruction in his favor on the first count. We have heretofore shown that the trial court should have given such an instruction for the plaintiff had there not been an issue in the case on want of consideration, in that McDermott claimed that O'Meara was to give him a certain acquittance in exchange for the note. This issue was, of course, found for O'Meara by the jury.

9-A refused, might well be the law for some cases, but not this. Its giving might have altogether misled the jury on the evidence in the case, which disclosed a full and complete compliance with the condition of the note, and *confessed by McDermott to be such*, T. 104.

10-A and 11-A were properly refused. Fraud was not charged against McDermott nor attempted to be proved. Bad faith on McDermott's part might be implied from the reply, but the contrary was disclosed by the evidence, that is to say, McDermott did his best to sell under the Galiger and Clymo agreement, and accomplished his desire. And while the Bishop, as owner, might have had a chance to so act with

reference to the lease and bond as to defeat the condition, yet the evidence shows that he did not so act as to defeat the condition. As before shown, when the note was given, the times of payments of the purchase price were even then changed, and changed again by McDermott's consent before actual payment; but McDermott finally accepted the purchase price as and for an acknowledged full compliance with the lease and bond agreement, T. 104. Hence, thereby McDermott estopped himself to urge that times of payment as limited in the first lease and bond agreement were the essence of the condition of the note. And it is further submitted, that McDermott had thrust himself too boldly into the limelight to avail himself of the Bishop's shadow.

18-A was properly refused. The court was asked to charge that McDermott was nothing more than a mere agent of the Bishop in the premises. The evidence is everywhere in the case that McDermott's agency was coupled with an interest in the purchase price. McDermott refused to say that \$34,000 was all that was coming to him from the Bishop in the premises. He strongly intimated that more was coming, and that the Bishop thought so. T. 198-9. What commission McDermott was to receive from the Bishop was a pertinent matter. Whether large

or small it would have given the jury a line on the value of O'Meara's services, since O'Meara was taken in by McDermott as a joint promoter of the mining claims. It pleased McDermott not to divulge the amount of his compensation. He therefore cannot complain that a line on the value of the services was permitted to be drawn from other legitimate evidence.

20-A, relating to the credibility of witnesses, was properly refused on the authority of State v. Penna (Mont.), 90 Pac. 787.

The line of argument pursued by defendant's counsel in his address to the jury, was not legitimate, nor authorized, and is apparently unwarranted by the record.

We feel that the rulings of the trial court were proper in each case, and that the more the record is studied and considered, the more accurate will the rulings of the court be found to be; and we further feel that the verdict of the jury, the judgment, and the order denying a new trial were each correct and proper, and should be sustained.

Respectfully submitted,

M. F. CANNING,

MAURY & TEMPLEMAN,

Attorneys for Respondent.





115 Pac. 912: 43 Mont. 189.

**In the Supreme Court of the  
State of Montana.**

\_\_\_\_\_  
No.....  
\_\_\_\_\_

JOHN H. O'MEARA,

*Respondent,*

v.

PETER T. McDERMOTT,

*Appellant..*

\_\_\_\_\_  
BRIEF OF APPELLANT.  
\_\_\_\_\_

**STATEMENT OF CASE.**

This action was once before before this court. (40 Mont. 38). The trial in the court below begun February 17th, 1910, and concluded February 21st, 1910. (Transc. pages 88 and 244). The complaint contained three counts.

In the first count of the complaint the respondent alleged that on the 27th of March, 1907, the appellant, for value, executed and delivered to the respondent a promissory note and agreement of the following tenor:

"Butte, Mont., Mar. 27, 1907.

"For value received, I, the undersigned, promise to pay John H. O'Meara, or his heirs, the sum of twelve thousand (\$12,000.00) Dollars, under the following terms and conditions, to-wit: Payments shall be made subject to the conditions and agreements of the existing lease and bond held by Messrs. Galiger and Clymo, from the undersigned, acting as agent for Rt. Rev. Jno. P. Carroll in the sale of the Burke and Balaklava Mining Claim, Silver Bow County, Montana.

"Six Thousand (\$6,000) Dollars shall be paid upon the completion of second payment on said lease and bond, less whatever portion of said six thousand (\$6,000) dollars shall have been paid before that time.

"The balance of six thousand (\$6,000) dollars to be paid not later than ten (10) days after the completion of the terms of said lease and bond and the fulfillment thereof.

"Failure to meet payments as specified in said lease and bond agreement, nullifies this note.

PETER T. McDERMOTT."

The plaintiff alleged that the terms and conditions of the foregoing note or agreement were complied with, and that the note was not paid and a judgment for the amount was demanded.

In the second count of the complaint it was

alleged that between the first day of October, 1907, and the first day of April, 1906, services were performed in and about procuring purchasers for the Burke and Balaklava Lode Claims, for which the defendant agreed to pay a reasonable price, and that the reasonable value of the services performed was twelve thousand seven hundred (\$12,700.00) dollars, of which seven hundred (\$700.00) dollars had been paid, and judgment was demanded for the unpaid balance.

In the third count it was alleged that the services mentioned in the second count were rendered at the special instance and request of the appellant at the agreed price of twelve thousand, seven hundred (\$12,700.00) dollars, of which seven hundred (\$700.00) dollars had been paid, and the prayer of the complaint demanded, on the three counts, judgment for twelve thousand (\$12,000.00) dollars with interest at the rate of eight (8) per cent. per year and costs. (See Trans. pages 5 to 9).

In answer to the first count the defendants' answer alleges that when the note sued on was executed and delivered the respondent and one John Kerrigan were threatening to bring suit for services alleged to have been rendered the appellant as attorney in fact for the Roman Catholic Bishop of Helena, in connection with the sale of the two mining claims referred to.

That prior to the execution of the note, the defendant disclaimed and denied such indebtedness, but that anxious to avoid suit, he executed and delivered the note in question upon the condition that the respondent and Kerrigan would execute and deliver to him a release and acquittance of all claims and demands against him, which they agreed to do, and that the delivery of the note was made with that understanding for that consideration, and that such release and acquittance was never surrendered to him, and that the note in question was without consideration.

In the answer it is likewise stated that on or about the 27th of March, 1907, the note or contract in question was delivered to the respondent herein by the appellant, but that he, the respondent, refused and declined to accept it. (Trans. page 15). It is likewise set forth in the answer that the lease and bond mentioned, and held by Galiger and Clymo was not performed, and that the payments were not made as provided for; that the agreement was afterwards changed, and that Galiger and Clymo, or either of them, never paid any part of the purchase price, as provided for in the lease and bond, and that the note in question is of no force and effect on that account. (Trans. page 16, lines 1 to 20 inclusive).

There is also pleaded in the answer a former

adjudication. (See Trans. beginning at line 21 on page 16 and continuing to line 8 on page 18). The plea of former adjudication rests upon the judgment in the action brought by the respondent herein and one Kerrigan against the appellant and others, upon the theory that they were entitled to share in the profits resulting in the sale in the claims on account of an alleged partnership relation existing.

The answer also pleads that by the commencement and prosecution of the action in which O'Meara and Kerrigan were plaintiff and this defendant and another were defendants, the plaintiff in this present suit elected to rely on his claim of a right to recover upon the ground that such services as were rendered by him were rendered as a partner, and to pursue such remedy as was open to him for the enforcement of such claim, and that by reason of so electing he is now estopped from maintaining or prosecuting his first or any cause of action in the complaint in the present suit.

The answer denies the causes of action set forth in the second and third counts of the complaint, and the plea of former adjudication is likewise set forth as to each of the second and third causes of action set forth in the second and third counts. (Trans. pages 18 and 19).

The answer also pleads as a defense to the second and third counts in the complaint that

the plaintiff herein, by commencing, together with Kerrigan, the other suit referred to, he, the plaintiff in this present action, had elected to rely on his claim of a right to recover upon the ground that such services as were rendered by him were rendered as a partner, and that inasmuch as judgment had been given against such contention, and the plaintiff herein having elected to pursue such remedy, and having lost, is now estopped from prosecuting the causes of action set out in the second and third counts.

The replication admits that O'Meara did not execute to the appellant any release, and that he did not procure from Kerrigan any release or acquittance of the demand against the appellant. The reply also admits that the respondent and one John Kerrigan, in June, 1907, commenced another action in the District Court of Silver Bow County against the appellant for two-thirds of one hundred and twenty-five thousand dollars, and that the said other action was tried and that judgment was entered therein in favor of the appellant herein, and against the said O'Meara and Kerrigan. The reply denied all other allegations in the amended answer. (Trans. pages 20 and 21).

The case was tried to a jury. (Trans. page 28, lines 1 to 10).

We need not concern ourselves with the second and third counts, as they were abandoned

by the plaintiff in the last trial in the court below. Not only was no evidence offered in support of either the second or third counts in the complaint, but the plaintiff, through his counsel, expressly abandoned the second and third causes of action in his complaint. When the instructions were being settled the court announced in open court that the court proposed to give instructions numbered one to six, inclusive, tendered by the defendant, and asked if the plaintiff had any objections or exceptions to the giving of any or all of these instructions, to which the plaintiff's counsel answered: "No objections." (Trans. page 237, lines 10 to 15). Instruction numbered one referred to by the court, and which the plaintiff assented to, expressly limited the consideration by the jury to the cause of action set out in the first count, which is on the instrument in writing. (See instruction numbered one, Trans. page 241).

The plaintiff was sworn as a witness for himself and produced the instrument sued on and offered the same in evidence. (Trans. pages 28 and 29).

The plaintiff on cross examination further admitted having testified in a former trial in an action brought by himself and Kerrgan against the defendant in this suit and his wife as follows:

"Q. And didn't you give that back to Mr. McDermott?

"A: I did, sir.

"Q: That note was twelve thousand dollars, was it?

"A: I think it was about that amount.

"Q. Don't you know that it was that amount exactly?

"A. I said I thought it was that amount.

"Q. Don't you know that it was that amount exactly?

"A: It was that amount as far as I can remember.

"Q. And didn't you give the note back to Mr. McDermott?

"A: I did, sir.

"Q: With the request that he make the note to you?

"A: No, sir, I gave the note back with the request that I would not accept it." (Trans. page 42, lines 19 to 31 inclusive. And also page 43, line 5).

The plaintiff further admitted on cross examination that he testified in the other suit mentioned as follows:

"Q: You did not request him to omit Kerri-gan's name from it. A: I did not, sir. Q: Now, when he came along at the time you say, why did you take this second note he handed to you? A: I didn't know it was note or what



it contained. Q: Why did you take it? A: When any friend came along and handed me a paper, I was not afraid to take it. Q: Are you willing to take anything that is handed to you on the street? A: I am not afraid to take it. Q: You never thought it worth while, having returned this paper to him, when he offered you another to decline to take the other? A: I certainly took it back and told him I would not take it. Q: At the time he offered it to you, you did not decline to take it? A: The second paper was handed as he was walking and continued walking." Did you not so testify?

"A. I think that is about it." (Trans. page 43, lines 6 to 25 inclusive).

The judgment roll in the case of John H. O'Meara and John Kerrigan, plaintiffs, against Peter T. McDermott and Mrs. Annie C. McDermott, was shown to the plaintiff while on the witness stand, identified by him, and offered and received in evidence without objection. (See Trans. page 59). The complaint in the other action commences on page 60 of the transcript. By that other suit the plaintiff in this action and one Kerrigan sought to recover from the defendant in this action two-thirds of one hundred and twenty-five thousand (\$125,000.00) dollars, which they alleged was due them as partners for their share of the profits in the sale of the Burke and Balaklava Mining Claims. The ac-

tion is known in the records of the District Court of Silver Bow County as No. A-638. The answer in the other action is found at Page 69 of the transcript. The judgment in Case No. A-638 is to be found at page 84 of the transcript.

E. B. Weirick, a witness for the plaintiff, was called and testified. He identified the lease and agreement which was offered in evidence by the plaintiff and found at page 115 of the transcript. He also identified the document dated June 14th, modifying the original agreement. The document dated June 14th, 1907, was offered in evidence by the plaintiff and received without objection and is found at page 121 of the transcript. The witness also produced the escrow agreement which was offered and received in evidence, and which is found on page 123 of the transcript. The witness Weirick testified also that on March 23rd, 1907, there was \$85,000.00 paid on the escrow agreement, as modified; on June 14th, the further sum of \$100,000.00; and on September 12th, 1907, the further sum of \$215,000.00. (Trans. page 124).

There were no other witnesses for plaintiff prior to his resting his case.

## MOTION FOR NON-SUIT.

Upon conclusion of plaintiff's case the defendant moved for a non-suit, (Trans. page 134, also page 136, line 22) upon the ground and for the reason that the plaintiff had by bringing the action referred to in the defendant's answer elected to pursue that remedy and was for that reason estopped from prosecuting this action; and for the further reason that the matters being litigated in this action were adjudicated in the former action wherein the court gave judgment against the plaintiff and in favor of this defendant. This motion for a non-suit was by the court overruled. (Trans. 136, line 25).

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## DEFENSE.

The defendant was sworn as a witness for himself and testified that in April, 1906, Dr. Maginn sought his aid in securing an option from the Bishop of Helena on the Burke and Balaklava claims (Trans. pages 137 and 138); that he, the defendant, met the plaintiff in this action at the B. A. & P. depot in April, 1906, at the suggestion of Dr. Maginn. (Trans. p. 137). That the plaintiff in this action and the defendant had a very brief conversation before the departure of the train, in which conversation the defendant addressed the plaintiff as follows:

"I understand, Mr. O'Meara, that you are

an applicant for this property." To which the plaintiff replied that he was. Thereupon the defendant further stated: "Well, now, I don't want to know anything about your application; as a matter of fact you stand as much show of getting it as I do, and between ourselves, I don't think either of us will get it. I think a big company will probably get it. But, if you are willing to give me information that is valuable or useful to me, I will see that you are taken care of," by which the plaintiff meant that he would recompense O'Meara. To the last statement the plaintiff replied, so the defendant testified, "That is satisfactory." (Trans. p. 138). The plaintiff succeeded in securing an option in his own name, which expired in January, 1907, but was unable to make any sale of the property under that option. (Trans. page 139). All deals had fallen through. Afterwards on February 1st the defendant herein was appointed by the Roman Catholic Bishop of Helena as the latter's agent or attorney in fact. (See Trans. page 126 and page 139). Under his appointment as agent for the Bishop the defendant succeeded in selling the two mining claims to Messrs. Clymo and Galiger. (Trans. page 141, line 26). The plaintiff herein took no part whatever in the negotiations with Clymo and Galiger and rendered no aid whatever in making the sale to them. (Trans. page 142). The defendant's version of the exe-

cution of the note sued on in this case is given in his testimony commencing at line 11 on page 147 of the transcript, and is as follows:

"Q: Now, coming to the matter of the execution of this note, when was the first payment made under the Galiger and Clymo lease and bond?

"A: To the best of my recollection, it was the 24th day of March, 1907. I think about a day or two afterwards, I met Mr. O'Meara, and he said to me, 'Now, Mac, you have made a good sale on this property, and I hope you won't forget your friends.' And I said, 'I'll try not to, John,' or words to that effect. 'Well,' he said, 'I'd like to have some money,' and I told him as soon as I went back to Helena and paid the Bishop his payment and came back, I would try to let him have some money. I did so. I think it was the 27th of March I gave him a check for five hundred dollars. There was nothing said at that time about having more coming to him. I subsequently gave him more. I think it was about three or four days after, two or three after, he came back to me and said he had used this money paying his debts, or some way, and, as I recall it, he and Kerrigan wanted to go out to Twin Mountain where they had some property and wanted some money for expenses, and said he had none left; so I gave him another check for two hundred dollars. In this

connection, I say they had some claims out at Twin Mountain. These claims had been the subject of consultations and conferences between us in the meantime in this respect: Mr. Kerrigan and Mr. O'Meara had represented that the claims were exceedingly good, that they were rich in copper. The purpose of our conversation was to the effect that if a good company took over the Balaklava ground that they would probably require more acreage as the acreage of the Burke and Balaklava claims was in the neighborhood of six acres which seemed very small in the point of acreage. They represented that their ground was rich, and it was my intention, if the ground was as good as represented, to turn it into the company. In other words, to sell it to the company. The nature of the talk which I had with them was to sell their property to the people who bought the Burke and Balaklava. I had been talking about selling their property to some people.

"About two hundred dollars which I gave him, I will say that I gave Mr. O'Maera a check for two hundred dollars, and in the meantime—I do not recall the exact day—I sent a mining engineer to the Twin Mountain. In regard to the two hundred dollars, I gave him a check for two hundred dollars within a couple of days; two or three days after he had got the check for five hundred dollars. Nothing was said at that time

in relation to anything more coming. They did not, not neither of them did, encounter me at any other time with any request or demand for more money. I should judge it was in the forepart of April, some time around the second or fourth, that I paid the two hundred dollars. They thought I was rather easy, I guess, so they came after me and endeavored to 'bluff' me, told me what I ought to do, and what the Bishop should do, and how instrumental they had been in helping me to promote this property, and I could see trouble was brewing. Mr. O'Meara seemed rather jealous in not thinking the services of his was not equal to the engineers I had to report on the property. So finally, I asked him, 'What do you think your services and those of Kerrigan are worth?' He said, 'I think we ought to get ten thousand dollars.' I said, 'Mr. O'Meara, you don't mind me holding a few postage stamps out of this;' or at any rate, the talk was of rather a strong character, and I got pretty mad, at the time. I said this to Mr. O'Meara, I said, 'I have never been in trouble before, and I don't want to have any.' I said, 'If you and Mr. Kerrigan will give me a written satisfaction in full of all demands, I will give you a note for twelve thousand dollars. You are claiming only ten thousand dollars, but I will make it twelve thousand,' and they were both very much pleased and accepted that proposition. I

immediately went and made out this so-called note; the first one, I think, he returned to me that same day. This was in the morning; I think he returned it to me that afternoon. The character of trouble that I was expecting in view of these demands that they were making, and the kind of talk that they put up, was after I saw their attitude and language, and I thought, while they made me threats at that time, that they would start a suit of some character, and it might prevent the company from completing their payments, and completing their contract, and so rather than have any trouble—as I told them at the time I was never in court—at the time I was willing to give this note for a written satisfaction. That was acceptable to them, so I went home and made out the note and agreement, and returned it to them that afternoon. Mr. O'Meara took the note and read it; Mr. Kerrigan also, to my recollection. The note was destroyed immediately upon the giving to them of this note now in evidence. That note differed from the note which has been introduced in evidence and marked Plaintiff's Exhibit A in simply one respect; and that was, the words, as I recall them or as near as I can recall them, 'it is further agreed that said John H. O'Meara settle with John Kerrigan in full of all demands.' When I presented that note, I presented it to Mr. O'Meara and Mr. Kerrigan, and, as I recall



it, we walked up to the post office together and went in the register department; so some one of them read it, and it was acceptable to them. This note, I should say, was made around the third or fourth of April. The other note, I think it was a day following, or not later than two days. Mr. O'Meara came to me with the original paper and said there was no use of them clauses in there; that he and Kerrigan could settle this between themselves, and he objected to them clauses, and he wanted me to make out a new paper eliminating that, cutting that out. 'Well,' I said, 'if it is satisfactory to Kerrigan, it is satisfactory to me.' So Mr. Kerrigan came along shortly after, and we talked it over, and Kerrigan said it was satisfactory. So immediately I went over to O'Gorman's cigar store, went to the book store next door, got a scratch pad which this is one of the sheets, and went in the back room, and wrote this out, which is identical with the other with the exception of the words I mentioned and gave this to Mr. O'Meara when he returned the other one. I asked him then for the written satisfaction and he said he would make it out and hand it to me. I subsequently had a talk with him about getting the written satisfaction. I saw him, to the best of my recollection, four or five times within the next three weeks or so and made a demand upon him for the written satisfaction, and he always kept put-

ting me off from day to day; and, finally, in company with Mr. Bob Walsh, whom I requested after telling the circumstances to come with me and witness the demand on O'Meara for the satisfaction. I met him on the corner of Broadway and Main, and asked him for the satisfaction, and he said he hadn't it, so I said, 'If the satisfaction is not in my hands by the first of May'—this was about a week preceding the first of May—'I will not hold myself any further accountable to you.' He replied, 'You will get what is coming to you from me, McDermott.' I subsequently had a talk with him in relation to the instrument, this note, Exhibit A, which I hold in my hands, one further conversation. After returning from one of my trips in May, I met Mr. O'Meara on the corner of Broadway and Main; I think it was at the Hirbour Block, and I called him across the street. I said, 'O'Meara, I understand that you and Kerrigan are going to bring suit against the Bishop and myself.' He said, 'Who told you so?' I said, 'My friends have told me so.' He said, 'Your friends lie.' 'Well,' I said, 'why should they tell me so?' or words to that effect, 'if there wasn't anything in it?' He said, 'I don't know anything about Kerrigan; he is pretty stubborn about this,' and he said, 'I don't intend to bring suit.' So one word brought on another and I guess we talked rather hotly. So I told him I

gave him this note, in satisfaction of all demands of Kerrigan and himself, and he reached in his pocket and said, 'Here is your old note; I don't want it,' and I said, 'I don't want it; it is no good to me,' and didn't take it." (Trans. page 147, line 11, to page 153, line 13).

Robert L. Walsh, a witness for the defendant, corroborated the testimony of the defendant to the effect that on April 26th, 1907, the defendant demanded of the plaintiff in this action satisfaction of all claims against him. (Trans. pages 191 and 192).

W. O. Clymo, a witness for the defendant, testified that he was a mining man and had lived in Butte twenty-eight years; that he had been employed by the Butte & Boston Consolidated Mining Company for fifteen years, and was familiar with the whole mining district in Butte. (Trans. page 194). He testified about some minor and unimportant information given to him by the plaintiff, which he used in making a report, but all of his interviews with the plaintiff were subsequent to the giving of the option to Clymo and Galiger. (Trans. pages 194 and 195).

W. T. Bleick, a witness for the defendant, testified that he was a stenographer and court reporter; that he had been such in Butte for ten years then last past; that he took the testimony as court reporter in the case of John H. O'Meara and John Kerrigan against Peter T. McDermott

and Mrs. Annie C. McDermott, (known as Case No. A-638); that he made accurate short hand notes of the testimony of the witnesses in that case and that at a trial of that case the plaintiff in this case, who was also a plaintiff in the other case, testified on direct examination as follows:

"MR. CANNING: 'March 27, 1907, For value received, I, the undersigned, promise to pay to John H. O'Meara, or his heirs, the sum of twelve thousand dollars, under the following terms and conditions, to-wit: Payment shall be made subject to the terms and conditions of the lease and bond held by Messrs. Clymo and Galiger, acting as agents for the Right Reverend Bishop Carroll; six thousand dollars shall be paid upon completion of the second payment on said lease and bond, less whatever portion of said six thousand dollars shall have been paid before that time; the balance, six thousand dollars, to be paid not later than ten days after the completion of the terms of said lease and bond, and the fulfillment thereof. Failure to meet payments as specified in said lease and bond, nullifies this note. Peter T. McDermott."

"Q: At what date, if you remember, did you receive that document which I have just read, from the defendant, Mr. McDermott?

"A: I don't know, but it was on the date it was written.

"Q. Under what circumstances did you receive it.

"A: We were standing on the corner of Main Street and Broadway, at the Hirbour Building, and Mr. McDermott came along and handed me the note folded up and passed along and went away.

"Q: Did you examine it at that time?

"A. No, sir, not until that afternoon.

"Q. When did you next see Mr. McDermott?

"A: Saw him in about two days.

"Q: What, if anything, occurred between you then, in regard to this note?

"A: I offered him the note and he would not accept it, and I would not accept it.

"Q: Under what circumstances did that last meeting take place? State the place where and at the time when as far as you remember it.

"A: The meeting was about the same place, at the corner of Main and Broadway; I was waiting there to see if I could see him for to give him back that note; he came along—Mr. Kerrigan was standing there; he asked me across the street on the opposite corner where the fountain was, on the northwest corner,—

"Q: He asked you to be where?

"A: He asked me across the street, across from one corner to another.

"Q: Proceed.

"A: He said: 'I understand that Kerrigan is about to institute suit against me and that you

are backing him.' I told him that I was not backing him at all, and I said: 'Who told you so?' And he said: 'My friends,' and I said, 'Your friends—you cannot say so,' and I said, 'I guess if Kerrigan has a suit, I have one,' and I said, 'You can have your note,' and he said, 'I don't want it, it is no good to me.'

"Q: Who do you refer to as I don't want it?

"A: Mr. McDermott.

"Q: For what, if you know, was that document rendered to you by Mr. McDermott?

"A: For a portion of my—I was a partner in a lease on the Burke and Balaklava." (Trans. page 213, line 11 to page 215, line 17).

The witness Bleick further testified as follows:

"I will now read what purports to be the cross examination in that proceeding of the plaintiff, John H. O'Maera, appearing upon pages 95, 96 and 97:

"Q: Now, about this so-called note that you produced here, isn't it true that when Mr. McDermott gave you that note that you and he walked up to the post office following it, immediately?

"A: It is not true, sir, it is not true.

"Q: You say that it was folded up when it was handed to you?

“‘A: It was.

“‘Q: What did he say?

“‘A: He just called me back a step and handed it to me and walked on.

“‘Q: What did he say?

“‘A: Nothing.

“‘Q: And what did you suppose it was?

“‘A: I did not know what it was until I opened it.

“‘Q: You opened it then, did you?

“‘A: I did not, sir.

“‘Q: Now, isn't it true that there was a note handed to you by Mr. McDermott a couple of days before this was handed to you, in which Kerrigan's name was mentioned?

“‘A: Yes, sir.

“‘Q: And didn't you give that back to Mr. McDermott?

“‘A: I did, sir.

“‘Q: The first note ran to you and Kerrigan?

“‘A: Yes, sir, as far as I can remember.

“‘Q: That note was for twelve thousand dollars, was it?

“‘A: I think it was about that amount.

“‘Q: Don't you know that it was that amount exactly?

“‘A: I said I thought it was that amount.

“‘Q: Don't you know that it was that amount exactly?

“‘A: It was that amount as far as I can remember.

“‘Q: And didn’t you give the note back to McDermott?

“‘A: I did, sir.

“‘Q: With the request that he make the note to you?

“‘A: No, sir, I gave the note back with the request that I would not accept it.

“‘Q: You did not request him to omit Kerigan’s name from it?

“‘A: I did not, sir.

“‘Q: Now, when he came along at the time you say, why did you take this second note he handed to you?

“‘A: I did not know that it was a note or what it contained.

“‘Q: Why did you take it?

“‘A: When any friend came along and handed me a paper I was not afraid to take it.

“‘Q: Are you willing to take anything that is handed to you on the street?

“‘A: I am not afraid to take it.

“‘Q: You never thought it worth while, having returned this paper to him, when he offered you another, to decline to take the other?

“‘A: I certainly took it back and told him I would not take it.’”

The witness Bleick testified that the testimony



he reported, and which he read in the trial of the case below, was testimony taken upon an application for an injunction in case No. A-638. (Trans. 219).

George M. Bourquin was called as a witness for the defendant and testified that he was one of the judges of the district court at the time of the hearing upon the application for an injunction and also upon the trial of the case known as A-638; that he had heard the witness Bleick testify in this case, who was on the witness stand immediately before Judge Bourquin, and that his, Bourquin's, recollection of the testimony given by O'Meara upon the trial of an application for an injunction corresponded with that read by Mr Bleick from his stenographic notes.

J. V. Flaherty, a witness for the defendant, testified that during all of the year 1907 he was one of the official stenographers of the district court of Silver Bow County; that he was present at the hearing of the preliminary injunction in the first trial in the case of O'Maera and Kerrigan against McDermott and his wife; that he took notes in shorthand in his official capacity of a part of the testimony at that trial; that at that time according to his notes the plaintiff in this action testified in the other action as follows:

"Q: How did you come to get this instrument, dated March 27th, 1907, which has been

offered in evidence, marked plaintiff's Exhibit "B." How did you happen to get this?

"A: Mr. McDermott handed it to me.

"Q: When?

"A: I guess on the date it was written.

"Q: Well, what is your recollection as to the date?

"A: It was about right, I guess.

"Q: During the month of March?

"A: Yes, sir.

"Q: And you think the latter part of the month of March?

"A: Yes, sir.

"Q: How long was the 27th after the first payment was made?

"A: The first payment was made, I guess, on the 14th of March.

"Q: Your recollection is that it was made on the 14th. Well, now, did you get this paper, with reference to the time you had this talk about the ten thousand dollars cash and the twenty-five thousand in stock?

"A: I got it later.

"Q: How?

"A: I got it later. That paper is later than when I had the conversation.

"Q: How much later?

"A: About a week.

"Q: And where were you when you got this?

"A: In Butte, on the corner of the Hirbour Block.

"Q: What happened between you when you got this paper; just state the conversation?

"A: There was nothing; no conversation; he just handed it to me and walked away.

"Q: And you took it?

"A: He handed the paper to me and just walked away.

"Q: He didn't wait for you to make an answer and you made no answer?

"A: No, sir, he didn't.

"Q: And you kept it ever since?

"A: I did sir.

"Q: Why?

"A: I didn't want to destroy it.

"Q: Is that the only reason? Now, tell us why, why you kept this paper.

"A: For the value, if there was any value to it.

"Q: Then you were satisfied to take it when he gave it to you, were you?

"A: Satisfied with the amount?

"Q: Satisfied to take the paper?

"A: The paper was folded up when I took it.

"Q: And you were satisfied to keep it, and did keep it?

"A: I did, sir.

"Q: And you were satisfied, and you did save it, didn't you?

"A: Yes, sir.

"Q: You read it over?

"A: Oh, yes, I read it over.

"Q: Did you read it over there at that time?

"A: Not at that time.

"Q: When did you first read it?

"A: I read it that afternoon.

"Q: And you were satisfied with it when you read it?

"A: No, not satisfied with the amount.

"Q: Why didn't you return it to McDermott?

"A: . He wouldn't take it.

"Q: Did you offer to return it to him?

"A: I did, sir.

"Q: When?

"A: Afterwards, on the corner of Broadway and Main.

"Q: On the same day?

"A: No, not on the same day.

"Q: Well, when?

"A: Two or three days after.

"Q: Two or three days after. On which corner of Broadway and Main?

"A: On the northeast corner.

"Q: On the northeast corner?

"A: Yes, sir.

"Q: Where is that from, the Hirbour Block?

"A: Across the street, the street at the fountain.

"Q: Who were present at that time?

"A: McDermott and O'Meara.

"Q: Yourself and McDermott?

"A: Yes, sir.

"Q: What did you say to him at that time?

"A: I offered him the note and he would not take it.

"Q: He wouldn't take it?

"A: No, sir.

"Q: What did you say to him?

"A: I told him I didn't want that note, and handed it back to him.

"Q: And that is all you said?

"A: That is about all.

"Q: Is that all you said? What did he do?

"A: He wouldn't take it back; he wouldn't accept it

"Q: What did he say; give us his language?

"A: He said he didn't want it."

At the close of the evidence the defendant in this case requested the court to give instructions numbered seven, eight, nine and ten, found on pages 234, 235 and 236 of the transcript. The court refused to give these instructions. These instructions were asked on the theory that the plaintiff herein had repudiated the note sued on in this case by his bringing the suit known as No. A-638; that if the note sued on in this case had no consideration other than a claim by the plaintiff that something was due him as a partner in the sale of the Burke and Balaklava, that the

note was wanting in any legal consideration; that the note sued on in this case was given as a compromise in settlement of the claim of O'Meara and that inasmuch as O'Meara had repudiated the settlement or compromise and had brought suit to recover as a partner he could not recover on the note in this action; and that the note in this action was given by the defendant to the plaintiff to avoid litigation, and that notwithstanding that fact the plaintiff disregarded the giving of the note and commenced litigation on his claim.

The verdict and judgment were in favor of the plaintiff for twelve thousand dollars with interest and costs.

On February 23rd the defendant filed his motion for a new trial. (Trans. pages 25, 26 and 27) The motion for a new trial was based on a bill of exceptions and affidavits. (Trans. page 27). The affidavits of Peter T. McDermott, T. J. Walsh, James E. Murray and Jesse B. Roote were filed in support of the motion for a new trial. All of these affidavits related to misconduct of plaintiff's counsel in making the arguments to the jury. (Trans. pages 248 to 254, inclusive).

On September 12th the District Court made an order denying the motion for a new trial. (Trans. p. 262).

There are two appeals, one from the judgment and one from the order denying the motion for a new trial. (Trans. p. 262).

## SPECIFICATION OF ERRORS.

1: The court erred in sustaining the following objection to the following question asked the plaintiff on cross examination:

“Q: And as a matter of fact, the fact that he was giving you—this was a note giving you the interest you had in the co-partnership, is not that correct?”

“MR. MAURY: Objected to as calling for a conclusion of law; one of the most difficult conclusions of law that it is possible to propound to a lay witness; scarcely any attorney in this room could tell under a certain state of facts if a co-partnership existed or not.” (Trans. page 32, line 25).

2: The court erred in sustaining the following objection to the following question asked the plaintiff on cross examination:

“Q: Well, now, if you say that the agreement was, at the time you accepted this note that you are suing on, as you have stated it is, how is it that you did not say anything about that when you brought the action for the profits on account of the existence of the partnership?”

“MR. MAURY: Objected to. It has not been shown that he has not testified so in the other action. It is assuming a matter not in evi-

dence. There is no evidence in this trial as to whether he did testify that way or the other way, or as to whether he stated anything about it, or whether he did not mention it in the other trial. It is an unwarranted assumption." (Trans. page 36, line 22).

3: The court erred in overruling the defendant's motion for a non-suit at the close of plaintiff's case, which said motion for a non-suit is set forth at length on pages 133, 135 and 136 of the transcript. (Trans. 136).

4: The court erred in sustaining the following objection to the following question propounded to the defendant by his counsel, to-wit:

"Q: Do you recall whether you testified about the matter at that time?

"MR. MAURY: Objected to as calling for a self serving declaration.

"MR. WALSH: Not at all. We propose to show that these people knew of this, that he was in Idaho Falls, and had every opportunity to examine the register there to contradict him; and that would demonstrate the truth or falsity of this man's testimony."

5. The court erred in refusing to give the defendant's request for instruction number 7, which proposed instruction, submitted by the defendant and which the defendant asked the court to give, reads as follows:

"If you should find from the evidence that



the instrument sued on was given to the plaintiff pursuant to an agreement between him and the plaintiff of adjustment or settlement of whatever might be coming to him either as a partner or because of services rendered in connection with the effort of the defendant to obtain a purchaser of the Burke and Balaklava claims, by which agreement it was arranged between the parties that the defendant was to pay the plaintiff Twelve Thousand Dollars in cash and give him Twenty-five Thousand Dollars worth of stock, and the instrument sued on was given in evidence of such agreement to pay said sum under the contract of adjustment and settlement thus entered into, and the plaintiff disregarding such agreement subsequently brought suit to recover from defendant what he claimed to be due him at the time such agreement of settlement was entered into, claiming to be entitled to recover either as a partner or for the reasonable value of his services, such conduct shall be a repudiation on his part of the agreement of settlement, and he cannot recover on the instrument in suit so given pursuant to such settlement." (See Trans. pages 234, 235 and 237).

6: The court erred in refusing to give Instruction Numbered Eight requested by the defendant, which said instruction is found at page 235 of the transcript and reads as follows:

**"INSTRUCTION NUMBER VIII.**

"It was determined and adjudged in the action referred to that no agreement of partnership was ever entered into between the parties hereto in reference to the Burke and Balaklava claims or in connection with the effort to procure a purchaser for the same and that no sum was ever due from the defendant to the plaintiff upon any agreement of partnership in such enterprise. If you find accordingly that the note in suit had no consideration other than a part or the whole of what was supposed to be due to the plaintiff as a partner on the transaction referred to, it is wanting in any legal consideration and your verdict must be for the defendant." (Trans. page 237, line 16 to 20, inclusive).

7: The court erred in refusing to give in defendant's request for Instruction Numbered Nine, which is set forth at full commencing on line 27 on page 235 of the transcript and reads as follows:

**"INSTRUCTION NUMBER IX.**

"If you find that the instrument in suit was given pursuant to any agreement of settlement and adjustment between the parties hereto of any claims being made by the plaintiff to be entitled to have of the defendant a portion of what the latter got or was to get out of the sale of the

Burke and Balaklava, or on account of services rendered defendant in his efforts to procure a purchaser of the same, and because of any violation by the defendant of such agreement of same and brought suit to recover on the claim in settlement, and the plaintiff disregarded the relation to such agreement was made, the plaintiff cannot recover on the instrument and your verdict must be for the defendant." (See Trans. page 237, lines 16 to 20 inclusive).

8: The court erred in refusing to give Instruction Numbered Ten requested by the defendant, which said instruction numbered ten is set forth in full beginning at line 14 on page 236 of the transcript.

#### "INSTRUCTION NUMBER X.

"If the instrument sued on was given pursuant to any agreement between the parties, to avoid litigation, and notwithstanding the same the plaintiff commenced the litigation on the claim or claims to avoid the action on which the instrument in suit was given he cannot recover on it." (See Trans. page 237, lines 16 to 20 inclusive).

9: The court erred in overruling the defendant's motion for a new trial. (Trans. page 262, line 10 and following).

## ARGUMENT.

The motion for a non-suit should have been sustained. When this case was before this court on a former appeal the present appellant, who was also appellant when the case was formerly before this court, urged in his brief and also in the oral argument that the court below upon the first trial of the present action committed error in excluding the judgment roll in case No. A-638, for, as was then contended by the appellant, the said judgment roll disclosed an election of remedies on the part of the plaintiff herein. But at that time the defendant had not properly, if at all, pleaded an election of remedies. In considering this case on the former appeal, this court said on this head:

“Defendant offered in evidence the judgment roll in the former case of O’Meara and Kerrigan against McDermott and wife, and the same was, upon objection, excluded by the court. It is contended that this was error. We find in the transcript a specification to that effect. In the answer the judgment is pleaded as ‘a determination of all questions with reference to the right of the plaintiff to recover anything from the defendant’; but this contention is not argued in the defendants’ brief. It is contended, however, that

the judgment roll discloses an election of remedies on plaintiff's part, which would estop him from maintaining this action. But this ground of estoppel is not sufficiently pleaded. See 15 Cyc. 261. It is clear that the pleader did not have this in mind at the time the answer was drawn. There was an opportunity to plead it, but defendant neglected to do so. Therefore it cannot avail him. 8 Enc. Pl. and Prac. p. 9; 16 Cyc. 806; *Myendorf v. Frohner*, 3 Mont. 282. And there is nothing in the record to indicate that the matter of estoppel by election of remedies was ever contended for by the defendant until after the cause reached this court. When the judgment roll was offered in evidence, no claim was made that it disclosed the facts that plaintiff had elected to pursue another and inconsistent remedy against the defendant. In fact, no statement was made by counsel as to the purpose for which it was offered, and the presumption is therefore that it was offered in support of the allegation that the plaintiff was estopped by judgment. The estoppel pleaded cannot be supported by evidence tending to show another and different estoppel..... The answer was drawn upon the theory that plaintiff was estopped by the result of the former action, to-wit, the judgment. The contention now is that he was estopped by his action in electing to institute that cause." (See 2nd column on page

1054 of 104th Volume of Pacific Report for decision on the former appeal).

After this case was remanded to the court below for a new trial the answer of the defendant was amended to cure the defects pointed out by this court when it considered the case before. (See the fourth paragraph of the amended and supplemental answer, transcript page 16, line 21, where estoppel by election of remedies is particularly pleaded).

The judgment roll in the other action, known as the partnership action, or action No. A-638, was introduced in evidence upon the cross examination of the plaintiff, and was therefore in evidence and before the court when the motion for a nonsuit was made. That judgment roll, in the other action, shows on its face that in that action the plaintiff was suing on the identical claim he is suing on in the present action.

No suitor is allowed to invoke the aid of the courts upon contradictory principles of redress upon one and the same line of facts. As soon as the choice is made of remedies and one of the alternative remedies proffered by the law adopted, his act at once operates as a bar as regards the other, and the bar is final and absolute. It may be stated as the correct rule that, subject to certain exceptions which are not involved in the present case, the first pronounced act of election is final and imperative. It is certainly

the established law, in every state that has spoken on the subject, that the definite adoption of one of two or more inconsistent remedies, by a party cognizant of the material facts, is a conclusive and irrevocable bar to his resort to the alternative remedy.

Towns v. Alford, 2 Ala. 378,  
Bryan-Brown Shoe Co. v. Block, 52  
Ark. 458.

Rucker v. Hall, 105 Calif. 425.

LaMar v. Pearre, 90 Georgia, 377.

Herrington v. Hubbard, 2 Ill. 569.

Kepler v. Jessup, 11 Ind. Appeals, 241.

Bradley v. Brigham, 149 Mass. 141.

Rowley v. Towsley, 53 Mich. 329.

Thompson v Howard, 31 Mich. 308.

Sacker v. Marcus, 86 New York Supp. 83.

Long v. Long, 111 Missouri, 12.

Nanson v. Jacob, 93 Missouri, 331.

Johnson-Brinkman Com. Co. v. Missouri  
Pac. Railway Co. 52 Missouri Appeals,  
407.

Green v. St. Louis, 106 Mo. 454.

Comstock v. Eastwood, 108 Mo. 41.

Sanger v. Woods, 3 Johns. Ch. 416.

Rice v. King, 7 Johns. 20.

Morris v. Rexford, 18 N. Y. 552.

Beloit Bank v. Beale, 34 New York, 473.

Roberts v. Ely, 9 N. Y. St. Rep. 796.

Welch v. Seligman, 72 Hun. 138.

Colvin v. Shaw, 79 Hun. 56.

Lera v. Treiberg, 22 S. W. 236.

Bauman v. Jaffray, 6 Tex. Civ. App. 489.

Warren v. Landry, 74 Wis. 144.

Pine Lake Iron Co. v. Lafayette Car Works, 53 Fed. 853.

Robb v. Vos, 155 U. S. 113.

15 Cyc. 262 and cases cited in foot note 65.

The rule that we are now invoking is forcibly stated in the case of Thompson v. Howard, 31 Mich. 308, as follows:

"A party may not take contradictory position, and where he has a right to chose one of two modes of redress, and the two are inconsistent, the assertion of one involves the negation or repudiation of the other. His deliberate and settled choice of one, with knowledge or means of knowledge of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again."

A case analogous to the present case is that of Sacker v. Marcus, 86 N. Y. Supp. 83. There an action was brought on a contract, on the theory that it created a partnership, and the court held that the plaintiff was bound by his election, and that he could not sue on the same contract on the theory that it was one of employment.

Though the parties to the action are different the result is the same.

Roberts v. Ely, *Supra*.

Welch v. Seligman, 72 Hun. 138.

Colvin v. Shaw, 79 Hun. 56.



The motion for a non-suit should also have been sustained on the ground that the plaintiff in this action is estopped by the judgment in the action formerly brought by him and Kerrigan against the defendant and his wife. A point which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, cannot be again drawn in question in any future action between the same parties or their privies, whether the causes of action in the two suits be identical or different.

Black on Judgments, 2nd Ed. Sec. 504,  
and cases there cited.

The rule was stated by the Supreme Court of the United States as follows:

"The general principle announced in numerous cases is that a right, question, or fact, distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

Southern Pac. R. Co. v. U. S. 168 U. S. 1.

It is a well settled rule, and one that is supported by a multitude of authorities, that a party cannot, by varying the form of action, or adopting a different method of presenting his case, escape the operation of the principle that one and the same cause of action shall not be twice litigated between the same parties or their privies.

Black on Judgment, 2nd Ed. Sec. 729.

In the case of *Hardin v. Palmeree*, 10 N. W. 773, the Supreme Court of Minnesota laid down the rule in the following language:

"That the remedy sought, or the mere form of action, may be different, does not prevent the estoppel of the former adjudication. If, upon the facts in issue in the former action, the plaintiff was entitled in that action to a remedy such as the law awards as compensation or redress for the alleged wrong, or if, upon those facts, he was entitled to no remedy, adjudication of his right to recover in that action bars his right to afterwards seek a different remedy upon the same facts or cause of action."

The reason given by Judge Bourquin for his decision in the former suit has no bearing whatever upon the question now being considered. It is a well settled rule that if a decision of a lower court is right it will be upheld regardless of the reasons assigned by the Judge of the lower court for making the decision. The evidence in this case clearly shows that in both actions, this ac-

tion and the former action, the plaintiff herein sued for what he claimed was his share of the profits growing out of the sale of the Burke and Balaklava Mining Claims. If he had recovered in the former action no one will have the temerity, we venture to say, to assert that he could maintain the present action. The fact that he did not recover in the former action does not change the rule.

The motion for a non-suit should also have been sustained on the ground that the evidence clearly shows that the plaintiff in this present action abandoned the instrument in writing sued on in this action.

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#### REFUSAL TO GIVE INSTRUCTIONS 7, 8, 9 AND 10.

By refusing to give Instruction Number 7, requested by the defendant below, the court took away from the jury the right to consider whether or not the plaintiff had repudiated the instrument sued on. This was one of the issues made by the amended and supplemental answer and the replication thereto. The court permitted evidence to be introduced on behalf of the defendant to tend to prove the repudiation of the instrument sued upon and then refused to permit the question to be left to the jury. There is abundant evidence in the record to show that the in-

strument sued upon was given as evidence of an agreement upon the part of the defendant to pay to the plaintiff the sum of twelve thousand dollars in money in settlement of the claim of the plaintiff of what might be coming to him either as a partner or because of services rendered in connection with the effort of the defendant to obtain a purchaser for the Burke and Balaklava claims. Indeed there is no dispute upon this proposition. There is also abundant evidence in the record to show that notwithstanding the giving of this note or agreement plaintiff herein disregarded the same and afterwards brought suit to recover from the defendant what he, the plaintiff, claimed to be due him at the time such agreement of settlement and adjustment was entered into. The authorities cited in support of our contention that the evidence shows the plaintiff herein had elected to pursue another remedy are equally applicable to our contention that the court should have given Instruction Numbered 7.

As to Instruction Number 8 requested by defendant: The plaintiff himself claims to have been a partner in the business of selling the Burke and Balaklava Mining Claims; he also takes the position that the note or instrument sued on was given to him in part settlement or evidence of his share of the profits in said partnership. Therefore Instruction Numbered 8

should have been given, because if there was no partnership then the instrument sued on is wanting in any legal consideration, and the verdict of the jury should have been for the defendant.

Instruction Number 9, asked by the defendant and refused by the court, correctly stated the law applicable to this case. If the instrument in suit was given pursuant to any agreement of settlement and adjustment between the parties to this action of any claims being made by the plaintiff to be entitled to have of the defendant a portion of what the latter got or was to get out of the sale of the mining claims, or on account of services rendered to the defendant in his effort to procure a purchaser of the same; and the plaintiff disregarded the same and brought suit to recover on the claim in relation to which such agreement was made, the plaintiff ought not to have recovered and the verdict should have been for the defendant.

For the same reason Instruction Number 10, asked for by the defendant and refused by the court, should have been given.

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### MOTION FOR A NEW TRIAL.

For the reasons already advanced, as well as for other reasons, we think the motion for a new trial should have been granted. When this case was before this court on a former appeal (40 Mont. 38) this court said:

"When the motion for a non-suit was interposed, there was nothing before the District Court showing any partnership agreement between the parties, except plaintiff's bald statement that he considered himself a partner. Neither was there any substantive testimony that he ever offered to return the note to McDermott. He testified that he accepted the note; and as a basis for impeaching testimony he was asked by counsel for defendant whether he had not testified at the other trial that he offered to return the note. His answers were evasive in some respects, but he never positively admitted having so offered. We may not, therefore, consider the matter."

The record made at the last trial is materially different in this respect. The official stenographers who reported the testimony of the plaintiff upon a motion for a temporary injunction and upon the main trial of the other case appeared as witnesses for the defendant and read from their stenographic notes the testimony of plaintiff on two occasions given in the other case. We refer to the testimony of the witnesses W. T. Bleick and J. V. Flaherty. It will be seen by the testimony of the court reporters that the plaintiff in this case repeatedly testified in the other action that he did not accept the instrument sued upon but offered to and did return the same to the defendant who refused to receive it. (See

testimony of W. T. Bleick, Trans. pages 214, 215, 216 and 217. See also testimony of George M. Bourquin, Trans. pages 223 and 224. See also testimony of J. V. Flaherty on pages 229 and 230 of the transcript).

The affidavits of P. T. McDermott, T. J. Walsh, James E. Murray and Jesse B. Roote, (Trans. p. 248, et seq.) clearly point of the misconduct of Matthew F. Canning and H. L. Maury, two of the attorneys for the plaintiff, in their arguments to the jury in the trial in the District Court. There was no evidence received to the effect that the defendant had received the sum of ten thousand dollars for himself out of the proceeds of the sale. Notwithstanding the fact that there was no evidence of this Mr. Canning, of counsel for the plaintiff, in his argument to the jury repeatedly asserted that the defendant had obtained out of the first money paid on the lease and bond the sum of ten thousand dollars. After repeating this statement several times Mr. Walsh, of counsel for the defendant, objected to the remarks of Mr. Canning, which objection was by the court sustained. Thereupon Mr. Canning immediately vociferously declared before the jury, referring to the objection made by Mr. Walsh, that "it is the galled jade that winces." The defendant was repeatedly referred to by Mr. Canning in his argument as a "tea peddler." The affidavits also show

similar misconduct by Mr. Maury in arguing the case to the jury. A mere reading of the affidavits in support of the motion for a new trial, which are not denied, is sufficient on this head. It requires no citation of authorities to convince one that the conduct of the plaintiff's attorneys in arguing the case to the jury was prejudicial to the defendant. For this reason, as well as for other reasons, the motion for a new trial should have been granted.

1 Spelling on New Trial and Appeals,  
Sec. 90.

We think the motion for a new trial should also have been sustained for the reason that the evidence disclosed that the payments provided for in the lease and option were not made as specified therein. The instrument sued on contains a clause reading as follows:

"Failure to meet payment as specified in said lease and bond agreement, nullifies this note."

The lease and bond referred to in the note appears at page 115 of the transcript. It is dated February 2nd, 1907, and by its express terms eighty-five thousand dollars were to be paid within forty days after February 2nd, 1907, one hundred and fifty-seven thousand, five hundred dollars within four months, and one hundred and fifty-seven thousand, five hundred dollars within six months after the date of the



first payment. It is likewise provided in this lease and bond that time is of the essence of the agreement, and that unless payments are made as provided for, the agreement should be null and void. The condition of the note required payments to be made as provided for in the lease and bond, and unless the payments were so made, the note was to be null and void. The respondent not only failed to show a compliance with these essential conditions, but he affirmatively shows a non-compliance with them. (See testimony of E. B. Weirick, Trans. Page 124).

An instrument was executed on the 14th of June, 1907, which provided for payment of different amounts and at different times from those named in the lease and bond. Under this latter instrument one hundred thousand (\$100,000.00) dollars was to be paid on June 14th, 1907, sixty-five thousand (\$65,000.00) dollars on December 1st, 1907, seventy-five thousand (\$75,000.00) dollars on or before June 1st, 1908, and seventy-five thousand (\$75,000.00) dollars on or before December 1st, 1908. (See plaintiff's Exhibit "D," Trans. P. 121). Payments were actually made at times and in amounts at variance with both agreements referred to. (Trans. P. 124, Testimony of E. B. Weirick).

The respondent failed in every particular to sustain the allegations of the complaint, and on the proof thus submitted a new trial should, we think, have been granted.

Stotesbury v. Power, 27 Mont. 496.  
Yateman v. Broadwell, 1 La. Ann. 424,  
Bagley v. Cohen, 50 Pac. 4,  
Friedenburg v. Auld, 5 Kan. 452,  
American Natl. Bank, v. Ducey, 40 S. W.  
551,  
9 Cyc., 615, and cases there cited.

The complaint in this action alleges that the terms of the lease and bond and the requirements thereof have all been complied with; that ten days elapsed after the completion of the lease and bond, and that the payments were made as provided for in the lease and bond. The proof, however, introduced by plaintiff in his case in chief affirmatively shows otherwise.

Cyc. Vol. 31, p. 714,  
Union Coal Co. v. Edman, 16 Col. 438,  
27 Pac. 1060.  
Groll v. Tower, 85 Mo. 249, 55 Am.  
Rep. 358.  
Morissette v. C. P. Ry. Co. 76 Vt. 267, 56  
At. 1102.

We respectfully submit that the judgment of the District Court should be reversed.

WALSH & NOLAN,  
JESSE B. ROOTE,  
Attorneys for Appellant.





115 Pac. 912; 43 Mont. 189.

## In the Supreme Court of the State of Montana.

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JOHN H. O'MEARA,

*Plaintiff and Respondent,*

*v.*

PETER T. McDERMOTT,

*Defendant and Appellant.*

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### RESPONDENT'S BRIEF.

A short statement of the case is:

A man made a promissory note for \$12,000 payable within ten days after the happening of a certain condition. The condition happened (40 Mont., 55, ll. 6-9). Ten days elapsed. He paid no part of it.

The defense, *openly* made in the lower court was that he had to get the money to pay with ~~from~~ the "sacred trust funds of the Roman Catholic Church." 255 R. 20. In support of this defense proof was introduced by him to the effect that he was married to the sister of the bishop of that church residing in Helena, 137 R. 29, and that he had babies, 160 R. 22.

Our belief is that when the assignment of errors is judicially analyzed there is no more meritorious defense than that one yet before this court.

Certainly in Montana, where speech is plain, any man, who has the money to pay his overdue written obligations, must deem himself lucky if, on refusing to pay, he is called by no harder name than "tea peddler."

We consider it not in accord with the policy of the law to grant new trials on written obligations for consideration (167 R. 10) simply because one man during the trial, truthfully calls another man a "tea peddler."

All the hurt to the feelings of Mr. McDermott, and all advertisement of his previous occupation would have been avoided by him, if, when the supreme court of this state decided that the condition of his obligation had been fulfilled, substantially, he had paid that obligation; or if he did not have the money to pay the obligation he had confessed judgment for the amount set forth therein and confessedly unpaid.

The appellant's brief seems to us to be not fair in its tone or in its general statement and treatment of the case. It appears to us to be insidious. Notwithstanding the fact that a motion for a new trial was presented to the lower court and denied, and notwithstanding the adverse verdict of the jury, yet contradicted statements of

Mr. McDermott seem to be treated as actual facts in the brief. The action of the court on instructions tendered and refused because the points involved were embraced in other instructions is charged as error. Errors are charged to the lower court on rulings excluding testimony when the record is silent as to what counsel intended to prove.

We shall take up the assignment of error *seriatim*.

### Specification No. 1.

It is asserted that the court erred in sustaining an objection to the following question:

“Q. And as a matter of fact, the fact that he was giving you, this was a note giving you the interest you had in the co-partnership? Is not that correct?”

An examination of the record shows that there was no offer of proof. The question, however, was objectionable. It called for a conclusion and for expert testimony as to what constituted a partnership under a given state of facts. Beyond a doubt no more difficult question testing out a man's knowledge of the law,—merchant, personal relations, and agency, could be put to any applicant for admission to the bar than to give him a certain state of facts and ask him if that constituted a partnership; or, what this

question amounted to is a more difficult proposition, what states of fact constitute a partnership? Our objection was doubtless suggested by our previous misconception of what facts would constitute a partnership. The question is not open for review by the appellate court.

State v. Byrd, 41 Mont., 585.

Furthermore, it had been judicially determined that there was no co-partnership,—a situation and condition which neither O'Meara nor McDermott could contradict.

#### Specification No. 2.

Specification No. 2 is also as to a ruling of the court sustaining an objection to a question asked O'Meara on cross examination, which question assumed that O'Meara had not said anything about the note and his agreement in accepting the same in the old partnership suit. The objection was that it had not been shown that he had not testified so in the other action. It *was* assuming a matter not in evidence. An examination of the evidence preceding that point in the transcript shows that the assumption was unwarranted, that counsel have no right, as a general thing, to assume a thing not shown by the evidence, and to base a question upon it in cross examination is elementary. However, an examination of the record here will show that there was no offer of proof made, and under the doc-



trine of *State v. Byrd*, supra, the matter is not before the court.

Specification No. 4.

Specification No. 4 is as to the exclusion of certain self-serving declarations about where McDermott had been in June, 1907. It was sought to show by McDermott's counsel that on another occasion he had testified truthfully as to his whereabouts, and that having so testified truthfully as to his whereabouts he was entitled, for having testified truthfully as to his whereabouts on one occasion, to greater credence than any ordinary witness who is presumed to testify truthfully all the time.

An examination of the record shows the following altercation, after this objection was sustained:

"Mr. Walsh: We offer to show by the witness, if the court please—

(Interrupted) Mr. Maury: Well, make it in writing.

The Court: Yes, that is the rule of the court unless the rule be waived.

Mr. Maury: The rule is not waived.

Mr. Walsh: We will make it later." 155 R. 20 to 156 R. 5.

It was never made later, and under the doctrine of *State v. Byrd*, supra, counsel are in no position to take advantage of any error if it was

error; but the instances where a person may bolster up his testimony and give it credence by asserting, on direct examination, that he told the same story at another time, are limited to cases where one speaks during the happening of a transaction, and under the excitement of the moment, and in certain criminal cases where the voice of nature speaks, and some rare instances where a man's general reputation is assailed in the trial. The objection was well taken and the ruling was correct.

#### Specification No. 5.

Specification No. 5 is a charge that the court committed error in refusing a certain instruction. This instruction was framed on a theory of the case that the note in question was given pursuant to an agreement between O'Meara and McDermott of settlement of whatever might be coming to O'Meara "either as a partner, or because of services rendered in connection with the effort of defendant to obtain a purchaser of the Burke and Ballaklava, by which agreement it was arranged between the parties that the defendant was to pay the plaintiff \$12,000 in cash, and giving \$25,000 worth of stock." This theory finds its only expression in the proposed instruction. It is certainly not hinted at in the complaint. It is not mentioned in the answer. 13 R. 1, et seq.

The answer speaks of certain releases of O'Meara and Kerrigan. Of course hereafter we shall have something to say about the legal effect or lack of any legal effect of this part of the answer. As far as our argument now is concerned, we simply wish to show that the instruction was not germane to anything in the pleadings or the evidence.

Close scrutiny of O'Meara's testimony fails to reveal even innuendo to the effect that the note was given in adjustment and settlement of any agreement to pay \$12,000 in cash, and give him \$25,000 worth of stock, and an examination of McDermott's testimony about the incident as found 153 R. 18 to 154 R. 15, shows a complete denial by him of any such transaction, and denial of any circumstances going to give any basis to the assumption of fact in the instruction proposed. It assumes another fact not in evidence in that it says that if suit was brought by O'Meara claiming to be entitled to recover either as a partner, *or for the reasonable value of his services*. That suit for the reasonable value of his services either has no foundation in the evidence, or means the present litigation before the bar of the court, because outside of this suit there never was one for the reasonable value of O'Meara's services. That instruction means, if a man brings suit he cannot recover. It is not sensible.

## Specification No. 6.

Specification No. 6 is the action of the court in refusing to give instruction tendered No. 8, 235 R. 10 to 28. No. 8 is substantially covered by No. 2 given, 241 R. 26, and No. 3 given, 242 R. 924, in so far as it does not require the jury to decide a proposition of mixed law and fact, and to render an accounting in equity of a partnership transaction. The following portion of the instruction tendered is objectionable.

“If you find accordingly that the note in suit had no consideration other than a part or the whole of what was supposed to be *due* to the plaintiff *as a partner* on the transaction referred to.”

This instruction would compel the jury to decide what a partnership is without defining to them whether a mining partnership is meant, a mercantile partnership, a law partnership, or any other kind of a partnership, and then it would compel them to go further; and (having decided that there was a partnership against the prior adjudication) the jury would have to be able to dispose of the question as to whether anything was “due” to O’Meara as a partner, which partnership each side was forever estopped from asserting the existence of.

## Specification No. 7.

Specification No. 7 is as to the refusal of the

court to give instruction No. 9. The court will notice that this instruction is open to the objection that it speaks of a violation by the defendant,—that is to say, McDermott,—of an agreement to settle. Now McDermott could have no advantage of his own violation of the agreement. A man cannot take advantage of his own wrong, and a court is unwarranted in instructing that he can do so or could do so, or that O'Meara could be deprived of any right or action at law or otherwise by reason of a violation by McDermott of the agreement. But the instruction is no wise germane to the theory of the answer or the evidence as introduced. The instruction, whether read as copied into the brief, or as found in the transcript, is not very clear in its language, and we must adopt the language of the court in the Gleason-Missouri River Power Company case. We claim to have ordinary intelligence. We cannot tell exactly what this language means. We do not think it would have tended to aid the jury in arriving at a verdict. The point intended to be covered by instruction No. 9 is covered fully and fairly in instruction No. 5, and in a clear manner sufficient to give the jury a correct understanding of the matter embraced in the pleading.

#### Specification No. 8.

Specification No. 8 is as to the refusal of the

court to give instruction No. 10. Instruction No. 10 proposed was to the effect that if the note was given to avoid litigation, and litigation was commenced, then there could be no recovery in this suit.

An examination of the answer as amended, and as supplemented, will show that the defendant says that on March 27th, 1907, O'Meara and Kerrigan were threatening him with *trouble*. 13 R. 10, et seq. It does not say that they were threatening him with litigation. It says that O'Meara agreed to execute a full acquittance; that it was made and presented to O'Meara with the understanding and promise that O'Meara would execute a full acquittance and get one from John Kerrigan, but it nowhere says that O'Meara agreed not to sue him. The instruction proposed is not in anywise relevant to any issue in the case, nor to any evidence in the case. Without going over all of the evidence to look at this point, the court can tell what McDermott's version of this is. It appears from McDermott's testimony, 153 R. 6, that O'Meara did not intend to bring suit.

There was in the pleadings and in the evidence certain testimony about the note having been given for a relase and satisfaction of claims from O'Meara and Kerrigan, and this feature of the case and theory is carefully and fully covered by instruction No. 5, found 243 R. 15 to 30, wherein it is said:

“Instruction Number 5.

“If you find that the instrument sued on was given pursuant to an agreement, if you find there was any such agreement between the parties hereto whereby the plaintiff agreed that upon the delivery of the same to him he would execute and deliver to the defendant a release and discharge of all claims and demands he might have against the defendant, or that he would execute and deliver such an instrument and would procure from one Kerrigan a similar instrument, and deliver the same, or have it delivered to the defendant, your verdict must be for the defendant for it is conceded that neither of these things was done.”

A reading of all the instructions given, as commencing 239 R. 20, and ending 244 R. 21, will do more than any argument we can make to convince the court of their clearness, their soundness, their brevity, and yet an elaborate enough statement of the law applicable to every theory made by the pleadings in so far as sustained by evidence.

The court will notice that we have so far omitted argument on specification No. 3 and on specification No. 9. No. 9, the last specification, is that the court erred in overruling the defendant's motion for a new trial. As we intend to treat No. 3 a little more elaborately than No. 9, we

will treat No. 9 at this point, and reserve our discussion of No. 3 until the last portion of the brief.

As to whether or not the defendant had a fair trial and as to whether there was prejudicial misconduct of counsel, we will have to go into the record with a little prolixity. It is claimed in the affidavit of McDermott that Matthew Canning referred to the fact, and stated to the jury, that McDermott had obtained out of the first money paid on the lease and bond ten thousand (\$10,000) dollars. Now that fact was in evidence by every intendment, for McDermott, previously a man without any means, says:

“When I delivered this note I certainly intended to pay it, if I got my commission out of the Burke and Ballaklava deal.” 170 R. 29, et seq.

“I am the one who first suggested raising it from ten to twelve thousand dollars.” 179 R. 18, Testimony of McDermott.

But in the opening statement for the defense, Jesse B. Roote, Esq., of counsel for the defendant, said:

“That it would be shown by the testimony unimpeachable of the defendant’s witnesses, that this entire case was an attempt on behalf of O’Meara to take away the sacred trust funds of the Roman Catholic Church; that every dollar of the purchase price of the Burke and Ballaklava lode claims was



the property of the Roman Catholic Bishop of Helena, Montana; and that McDermott did not have the right to handle any of it, nor was any of it his own." 255 R. 17 to 28.

The purpose of Canning's argument was to avoid the effect of this statement. No man of fairness, whatever his religion, desires a misappropriation of the funds of that eleemosynary institution and that statement having been baldly made by Mr. Roote, in all propriety had to be rebutted by Canning and contradicted. When counsel make a fetid appeal to prejudice, and one which is shown by the evidence to be absolutely false, opposing counsel is not limited to asking the court to instruct that the statement is irrelevant and prejudicial, but can show its falsity as well. The evidence certainly tends to show in this case that some of the sale price of the Burke and Ballaklava found its way into McDermott's hands and became his own property, and the most appropriate and safest way to relieve the jurors minds of the effect of the prejudicial statement of Mr. Roote was to comment on its having been disproved and thoroughly shattered by the evidence. Some latitude must be allowed opposing counsel when, in the opening of a trial, a lawyer boldly seeks to bring into a case such bias and prejudice and chicanery as is exhibited in the language used by Mr. Roote.

The fact that Canning made some little pleasantry about its being the "galled jade that winces" merely showed that both the galler and the gallee were possessed of a certain quick spirit of repartee inherent in large measure in persons of the same blood with plaintiff and the defendant and plaintiff's chief counsel and the defendant's chief counsel.

The term "tea peddler" would, under the evidence here, add, rather than detract from the the character of defendant McDermott. When he was a tea peddler he lived a life of open honesty. He paid his indebtedness when he got the money to do so—(such as appertained to his private life, and did not accrue by virtue of any business dealings in which others were interested), and he was looked upon and trusted by all during the time that he was a "tea peddler" as an honorable man whose word was good. The statement was perfectly truthful and it would not have changed the status of McDermott in the jurors' eyes if he had been called a *peri-patetic* vendor of teas, with authority to exhibit the wares of his master, but without authority to accept payment therefor. We suggest that even if Canning had used the word "Dead Beat," it would not have been unfair, under the view taken of the evidence by two juries and the law of substantial fulfillment announced by the supreme court.

Now the balance of McDermott's affidavit for a new trial is about certain misconduct of Maury. The court is doubtless surprised to find, after having reviewed cases where Maury has made argument for approximately fifteen years last past, that Maury has been charged with making an improper argument. It is the first charge of its kind, and it will be found on examination, that this argument was not improper and would never have been made but for the intimidation practiced on Maury and on the court by Mr. Walsh. Mr. Walsh offered in evidence a judgment roll; and when this judgment roll was offered Maury said to Walsh that it should be restricted by instructions; that all of it was not proper to be submitted to the jury; but Mr. Walsh in a very authoritative tone of voice, indicating that he would brook no answer, said "It is offered in evidence *entire*, for all purposes," and Maury said nothing further. 256 R. 20, et seq. Now, when McDermott offered it for all purposes, and we suggested that it be restricted by instructions, and they failed to ask its restriction by instructions until we were making a time limit argument to the jury, and then asked the court to tell us what evidence before the jury is proper to be argued on, and what evidence is improper to be argued on, they are asking too much of the court. They put it in evidence without any restriction, for all purposes. We took

it as we found it and we had a right to do so. If counsel cannot take all the evidence, or any of the evidence that his opponent puts in without restrictions in his offer, and without restrictions from the court, then counsel cannot make any argument at all to the jury. It is too late to ask for instructions when you have closed for the defendant and you see the effect on the jury of evidence which you have brought into the case, and though your opponent suggested a restriction, you met his offer of kindness, and his suggestion of a correct and safe way of proceeding, with insolence.

But, further, on this question of error or not in denying the motion for a new trial, the rule is well settled that where the verdict, in right, and justice, and law, was substantially correct, and any other verdict would be illegal and wrongful, and a delay of justice, then bitter statements and animated action of opposing counsel during a trial are not to be considered. A determination of this feature of the case brings us to the chief matter of argument in the cause. That is, specification No. 3. And this feature of the case we believe will be appropriately treated under our argument on that specification.

It is urged in the brief of counsel, that motion for a non suit should have been sustained for two reasons: One (treated in an argument of

four lines and three words, on page 43 of the brief), that plaintiff abandoned the instrument in writing sued on. We find no other treatment of it in the brief. And the other is the point which was suggested to them by the first opinion by the supreme court. We believe that they misunderstood the opinion. There is nothing there holding that the partnership suit was an election.

Two estoppels are pleaded in the answer:

(a) That O'Meara's prosecution of this suit is estopped by reason of the judgment rendered against him in the partnership suit; and

(b) O'Meara's prosecution of this suit is estopped by reason of electing to prosecute the partnership suit, or, as put by the appellant, by reason of the election of the wrong remedy.

We shall treat the questions a and b together. They are so closely associated in the law that it is very hard to separate the points and arguments and opinions of courts bearing on one question from authority bearing on the other. Counsel rely on a dictum of the former opinion of the court in this case as to a possible bar by reason of an election of remedies which was not plead by defendant prior to the first trial of the case. This dictum does not support counsel's theory nor their argument, and furthermore this dictum was uttered before we had our day in court on this phase of the case. The

slightest suggestion of the circumstances incident to these two actions,—the one at law being before the bar of the court, and the other in equity,—would reveal that there was no bar or estoppel by reason of any prior election of remedies.

1. The note now sued on was not due when the first suit was commenced.

2. There was no remedy by partnership accounting at all because the court adjudicated finally that the right out of which a remedy of partnership accounting might have arisen, to-wit, a partnership, never existed.

3. The decision in the partnership case was based on a finding that there was no partnership and there was no adjudication one way or the other on the promissory note embraced in this action. And by reason of the promissory note's not having been due at or prior to the institution of the first suit there was no method by which there could be any adjudication.

4. The parties were different in the first suit, the same being between O'Meara and Kerrigan of the plaintiff's part, and McDermott and wife of the defendant's part.

5. The evidence necessary to sustain a judgment for the plaintiff in the present action, and sufficient to sustain a judgment for plaintiff in the present action would not be sufficient to sustain a judgment for the plaintiff's or either of them in the first action.

6. The questions involved in the second action were none of them needfully considered or necessary to support the judgment gained in the first.

7. It does not appear from the judgment roll in the first action that there was any express declaration that the decision was rendered upon the merits.

On the general question of estoppel by election and estoppel by judgment, there is a valuable note found under *Hudson v. Remington Paper Co.*, 6 Am. and Eng. Anno. Cases, 103. The point decided in this case is very salient to the issue:

“Where the entry of judgment in an action involving several issues of fact recites *a finding* upon one of such issues that compels a judgment for the defendant, and is silent as to the rest, there is no presumption that they have been passed on, and in the absence of some further showing that will be held open to inquiry in the future litigation between the same parties based upon a different cause of action.”

Will the court here examine the old decision 77 R. 10-20?

An adverse in a suit for a share of the profits of partnership business as compensation for services rendered to a firm is not a bar to an action

upon a *quantum meruit* for the value of such services.

Kirkpatrick v. McElroy (N. J.), 7 Atl., 647.

A judgment dismissing an action for an accounting between co-partners on a finding that no partnership existed, is not a bar to an action for the services.

Marsh v. Masterson, (N. Y.), 5 N. E., 59.

A judgment is not available as an estoppel unless the particular controversy was necessarily tried and determined. The adoption of the wrong form of action does not operate as an estoppel.

Bigley v. Jones, (Pa.), 7 Atl. Rep. 54;  
Elgin Nat. Watch Co. v. Meyer, 29 Fed., 225.

"A judgment is not available as an estoppel, unless the particular controversy was necessarily tried and determined. Bigley v. Jones, (Pa.), 7 Atl. Rep. 54; Dicken v. Hays, Id. 58; Steam-gauge & Lantern Co. v. Meyrose, 27 Fed. Rep. 213; Geneva Nat. Bank v. Independent School-dist. 25 Fed., 629; Oliver v. Cunningham, 7 Fed. Rep., 689; Smith v. Town of Ontario, 4 Fed. Rep. 386; Richardson v. Richards, (Minn.), 30 N. W. Rep. 457; Nichols v. Marsh, (Mich.) 28 N. W. Rep., 699; Brigham v. McDowell, Neb.) 27 N. W. Rep. 384; Morse v. County



of *Hitchcock, Id.*, 637; *Shirland v. Union Nat. Bank*, (Iowa), 21 N. W. Rep. 200; *Fish v. Benson*, (Cal.) 12 Pac. Rep. 454; *Reynolds v. Lincoln, Id.*, 449."

A judgment in a proceeding for an accounting between plaintiff and defendant as partners, in which proceeding plaintiff set up a claim for services rendered the partnership, cannot, as a matter of law, be held to bar a subsequent action for services, against defendant individually, where there is some evidence that the services sued for were not embraced in the claim set up in the former proceeding.

*Kaster v. Welch* (Penn.), 27 Atl. page 668.

On the general question as to whether a subsequently accruing cause of action can be held barred by prior adjudication, a case in point is found,

*Wagner v. Wagner*, (Cal.), 37 Pac., 935.

Where a plaintiff declares on an account stated, and offers certain promissory notes as evidence to prove the fact of an accounting, but the evidence is rejected and judgment given against the plaintiff, this will not bar a future action by him on the notes.

*Black on Judgments*, Par. 617.

So the conclusive effect of a judgment does not extend to references made by a party in his

pleadings, to matter not involved in the controversy,—such references being made merely for the purpose of elucidating the points really at issue.

**Black on Judgments, Par. 617.**

The allegation concerning this note in the old partnership complaint is as follows, 66 R. 26-30:

“That he has refused to make any account, though he has acknowledged in writing and agreed to pay the plaintiff, O'Meara the sum of twelve thousand dollars (\$12,000.00) when the payments shall be made by Galiger and Clymo, but he has not agreed to pay Kerrigan anything.”

Of course a judgment being conclusive only upon matters within the issues, it is not an estoppel as to after-occurring facts not involved in the suit in which the judgment was rendered.

Black, Judgments, P. 617;

Mitchell v. French, 100 Ind. 334.

Black, Judgments, Sec. 618, is as follows:

“Matters which could not have been adjudicated.—A judgment is not conclusive of any matter which, from the nature of the case, the form of action, or the character of the pleadings, could not have been adjudicated in the former suit. ‘There can be no bar if the demand to which, by their evidence, the parties directed the attention of

the court, and which the court rejected, was not within the issue and consequently could not have been allowed. The estoppel does not depend upon technicalities, but rests in broad principles of justice, and it can apply only when the party has had *his day in court* and an opportunity to establish his claim.

The fact that a suit has been instituted and evidence produced is of no importance whatever, if in fact the evidence was directed to matters which were foreign to the issue. If, for example, the plaintiff in an action of assumpsit were to attempt to litigate a matter of trespass to lands, it would be immaterial how far he should go into the evidence, or at what stage of the proceedings the ruling should be made rejecting his claim; the bar cannot attach, because in law, whatever may have been the testimony, there could have been no recovery. Nothing would seem to be plainer than that no man could be barred by a judgment against him who was not by the issue placed in such a position that establishing his demand would entitle him to a judgment in his favor.' Thus, in an action of debt for money lent and other causes, the defendant pleaded in bar a former recovery by the plaintiff of the same claim, had in a suit on a promissory note and for work and labor. But it was held that the plea was bad, inasmuch as the plaintiff, in the former suit, could not have given evidence of money lent, and con-

sequently the present demand could not have been proved."

"Sec. 619. Judgment on Matters not Presented.—We have elsewhere shown that if the court assumes to pass judgment upon a point or question not submitted to its arbitrament by the parties in their pleadings, nor drawn into controversy by the course of the evidence, the judgment, to that extent, is without jurisdiction and consequently null. It follows that the judgment of a court upon a subject of litigation within its general jurisdiction, but not brought before it by any statement or claim of the parties, is not conclusive of that matter in any subsequent controversy, by reason of its invalidity."

We call to the attention of the court a very careful opinion written by Judge Cooley: *Fifield v. Edwards*, 9 Mich., 264. The general tenor of which is: Estoppel from asserting a claim, excluded from a former suit, cannot apply where it was not within the issue in that suit, and there was no opportunity to establish it.

Where the money sued on in the second suit *had not fallen due* when the first suit was commenced there can be no bar by reason of an adverse judgment in the first suit.

*Hallack v. Gagnon*, 4 Colo. App., 60, 36 Pac. 70;

- Schmidt v. Louisville, etc. R. Co., 84 S. W., 314, 27 Ky. L. Rep. 21;  
 Overton v. Gervais, 6 Mart. N. S., 685;  
 Ahl v. Ahl, 60 Md., 207;  
 Raymond v. White, 120 Mich., 165, 78 N. W., 1071;  
 Doescher v. Spratt, 61 Minn., 326; 63 N. W., 736;  
 Ransey County Bldg. Soc. v. Lawton, 49 Minn., 362; 51 N. W. 1163;  
 Armfield v. Nash, 31 Miss. 361;  
 Burnside v. Wand, 108 Mo. App., -539; 84 S. W., 995;  
 Jones v. Silver, 97 Mo. App. 231; 70 S. W. 1109;  
 West v. Moser, 49 Mo. App. 201;  
 Priest v. Deaver, 22 Mo. App. 276;  
 Wheeler v. Bancroft, 18 N. H. 537.

One of the most prolix decisions on the subject of the estoppel, arising from a former adjudication, has been announced by the supreme court of Montana:

Kleinschmidt v. Binzell, 14 Mont., 31 to 61.

An analysis of that case shows that this former judgment in Kerrigan and O'Meara v. McDermott and wife, could not possibly have barred the present action.

The note could not have been litigated in the partnership suit, commenced before the payments on the note were due.

Radue v. Pauwelyn, 27 Mont., 68.

As far as the estoppel by election is concerned, in addition to the authorities herein cited that there can be no bar by electing one remedy before the right involved in the second suit is matured, (an elementary proposition usually encountered where there has been an abortive attempt to prematurely foreclose a mortgage), we again refer the court to its decision in a case where we tried to get a debt paid by a similar proceeding.

Kaufman v. Cooper, 39 Mont., 146; and also to

Glass v. Basin & Bay State Min. Co., 35 Mont., 573;

Glass v. Basin & Bay State Min. Co., 34 Mont., 88;

Chapman v. Hughes, 58 Pac., 298;—3 rehearings.

On page 43 of the appellant's brief, there is a four line statement, not argued, that the motion for non-suit should have been sustained on the ground that the evidence clearly shows that the plaintiff in this present action abandoned the instrument sued on. We find no argument outside of the statement of counsel. Under all of the circumstances of this case, or of any case, it would be hard to convince any reasonable man that the possessor of an instrument in writing,—a promise to pay twelve thousand dollars, would ever abandon such an instrument. The circumstance is much stronger when it is considered

that at the time the instrument was given the promissor was about to receive large amounts of money out of the sale of land when consummated, which sale had gone beyond a payment of seventy-five thousand dollars as part of the purchase price. To claim an abandonment of such an instrument is rather incredible.

It is an elementary proposition of law, without the aid of a statute, that an owner of such an instrument could not release it on a part payment because the release would be to a certain extent void for want of a consideration. That doctrine is elementary. In Montana, of course, we have a statute to the effect that where a release is made in writing for less money than the instrument calls for, it is binding; but we look in vain through this record for a spark of testimony that there ever was any writing abandoning this instrument once delivered. Furthermore, the plaintiff could accept the instrument at any time before the commencement of suit. There is no law preventing that. It was never withdrawn by McDermott nor any notice of withdrawal given, and the testimony about the offer to return the note to McDermott, and the dissatisfaction of O'Meara with it showed that *O'Meara was merely dissatisfied with the amount of the instrument.*

Page 28 of appellant's brief quotes some of his testimony given at a previous trial of the partnership suit:

“Q. And were you satisfied with it when you read it?

A. No, not satisfied with the amount.”

And again on page 27 of appellant’s brief, quoting the testimony of O’Meara in the partnership suit:

“Q. And you kept it ever since?

A. I did sir.

Q. Why?

A. I did not want to destroy it.

Q. Is that the only reason? Now tell us why you kept this paper?

A. For the value if there was any value to it.

Q. Then you were satisfied to take it when he gave it to you, were you?

A. Satisfied with the amount?

Q. Satisfied to take the paper.

A. The paper was folded up when I took it.

Q. And you were satisfied to keep it and did keep it?

A. I did sir.

Q. And you were satisfied and you did save it didn’t you?

A. Yes, sir.

The entire testimony foregoing, and this being the testimony on which it is supposed that O’Meara was impeached, shows that all through the partnership suit, both at the injunction hear-



ing and on the final hearing, O'Meara's dissatisfaction and objections to the note were on account of the amount of the note being too small.

That there was a consideration for the original instrument now sued on cannot be more clearly established than by McDermott's own testimony, as quoted in the brief of his counsel on page 15. He discusses the raising of the note for the services from ten thousand dollars to twelve. He says that was at his suggestion, and he says that he did it after having asked O'Meara and Kerrigan "What do you think your services and those of Kerrigan are worth?" And then after that he gives a note to pay for the services.

There is a dispute in the testimony as to what was to be done about Kerrigan, but all of these contradictions have been resolved in favor of plaintiff by a verdict.

While we are on this feature of the case, we would ask why McDermott's testimony, commencing on page 11 of the brief, and ending on page 19, is put in the brief at all. It does not state any defense whatever, but if it did the issue has been resolved in favor of O'Meara, and beyond that a motion for a new trial has been denied. The same thing may be said of the incumbrance of the brief with long quotations from the testimony of the remainder of McDermott's witnesses, these quotations, commencing on page 19, and ending on page 29,—eighteen pages of a

fifty page brief devoted to the testimony of witnesses whose testimony has been overruled by the verdict of the jury and by the lower court. Pages eight and nine of the brief are devoted to quoting testimony about, or given by O'Meara at another time about an entirely different note than the one sued on, it being a note to O'Meara and Kerrigan which everyone agreed was returned to McDermott. This court is only for the correction of errors, not of original jurisdiction in this case.

It is claimed in the brief that the conditions of the note was not fulfilled. This claim cannot be upheld. Whatever the law once was on this subject in Montana, it is now the law that substantial fulfillment is all that is necessary, and it is the law of this case that the Galiger-Clymo option or lease and bond, as it is popularly called, was fulfilled. Such is the certain tenor and absolutely binding holding of this court in the case of O'Meara v. McDermott on first appeal.

The testimony of the witness Weirick, as found on page 10 in the brief of appellant, is the same as it always was, and to the effect that the four hundred thousand dollars set forth and called for by the Galiger-Clymo contract was paid.

McDermott's contention that O'Meara was to give him a written satisfaction of all demands as set forth in his answer, is void when one considers his testimony on the subject. The testi-

mony of McDermott indicates that the note was given on consideration that O'Meara would *subsequently* give him a written satisfaction of *all demands*. This proposition resolves itself into an absurdity because the written satisfaction of all demands had application only to this demand. To think that two sane men would settle up a business by one man's giving a note for twelve thousand dollars, and the other one agreeing to give a written satisfaction of this very demand a few days later, is simply nonsense, but such is the testimony of McDermott, 166 R. 28 to 167 R. 15. Such agreements are not only absurd but they are void by law.

See Sec. 5056 Revised Codes of Mont., 1907, reading as follows:

"Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by usual proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights is void."

Under the foregoing section, the answer wherein it reads that there was to be delivered subsequently to the execution of the note, a release of all demands, is invalid under the laws of Montana.

For the portion in question of the pleadings, see 14 R. 10 to 15 R. 25.

This defense and the evidence supporting it has no foundation in common sense. The foundation in law is knocked out from under it by statute, and it is but an appeal to prejudice and whim of the jury. The defense in the lower court was made by way of an appeal to favor for McDermott because of his intimate relationship with the head of the Catholic Church in Montana. It failed of recognition by either jury which has tried the case, or by the judge of the lower court. There never was put forth any defense based on merits or justice or honesty or fair business dealing. We believe the days of technicalities are over. At least we hope that, in the words of St. Augustine, "The dawn is breaking when the shadows flee away."

The court has the physical power to disturb the verdict of the jury and the judgment of the lower court, and the order of the lower court denying the motion for a new trial, but we respectfully submit that the legal right to do so is not here. There is no appeal here to consideration of the merits nor of the law. The merits are against the contention of the defendant. The law is against the contentions of the defendant. The trial has been fair. The question is: Are written contracts for valuable considerations between persons capable of contracting, and about a lawful subject matter, enforceable in this state? We

believe they are, and we respectfully submit that there is no other question before this court in this case.

Respectfully submitted,

MATTHEW F. CANNING,  
MAURY & TEMPLEMAN,  
Attorneys for the Plaintiff and Respondent.









# Supreme Court

OF THE  
STATE OF MONTANA

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JOHN H. O'MEARA,

Respondent,

v.

PETER T. McDERMOTT,

Appellant.

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## REPLY BRIEF OF APPELLANT.

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The brief of the respondent filed on this appeal is no fair or candid discussion of the question of law presented by the record. It exhibits from beginning to end a disposition, akin to that which made the address of counsel to the jury below an offense here complained of, to poison the mind of the court by continuous aspersions against the integrity of the appellant. No superior virtue is claimed for him by his counsel, but they insist that as a litigant in this court he ought not to be subjected to caustic comment which presupposes his dishonesty in the assertion of the defenses which he submits to the arbitrament of this tribunal.

The fact that "two juries" or forty juries, as counsel knows or ought to know, decided against the appellant, affords no justification whatever for accusing him, by innuendo, of being a "Dead Beat." This court held that he did not have a fair trial before the first jury which heard the case, and all but held, if it did not hold, that there was no merit whatever in the claim now asserted against him.

The history of the litigation might admonish counsel amenable to its lessons to refrain from inviting comparisons involving the comparative honesty or dishonesty of the litigants.

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The only justification attempted by the brief on behalf of the action of the court in refusing to give the appellant's offered instruction No. 5 is that it presents a defense not pleaded.

The answer pleaded that the note sued on was without consideration, or rather that the consideration had failed. It alleged that a claim of liability on the part of the appellant to respondent and one Kerrigan on account of services alleged to have been rendered by them in connection with the sale of the Butte and Balaklava mining claims was by them set up, and that they were threatening trouble on account of it; that in view thereof the appellant proposed to respondent that if he and Kerrigan would execute and deliver to him a full acquittance of all claims and demands he would execute and

deliver to respondent a writing to the effect of the instrument sued on herein; that the proposition was accepted, and the agreement carried out by appellant on his part, but that the release and satisfaction bargained for was never made by respondent and Kerrigan, and that disregarding the settlement thus entered into, they brought suit on the very cause of action to avoid which the instrument in question was executed.

Transcript, pages 13-20.

These averments were denied in the reply.

Transcript, pages 20-21.

The consideration for which the instrument in suit was given thus being put in issue, the respondent sought, in the course of his testimony, to tell the true consideration for it.

He asserted that the paper was given as the result of a "settlement" between himself and appellant of what was coming to him in connection with the sale of the Butte and Balaklava.

Transcript, page 54.

He told that he and appellant were partners in that transaction,

Transcript, page 32,

and that he was not charging for specific work which he did in connection with it, but was claiming as an equal partner,

Transcript, page 35,

pursuant to agreement he entered into with the ap-

pellant at the depot in Butte in the month of April, 1906,

Transcript, page 34,

under the terms of which he was to share the profits of the enterprise equally with appellant.

It is a part of the history of the litigation that he subsequently brought suit jointly with Kerrigan to obtain an accounting of alleged partnership profits, in the sum of \$125,000, claiming one-third thereof, in the complaint in which action he charged that he, appellant and Kerrigan were equal partners in the enterprise.

Transcript, pages 59, 60-68.

Also that in that action the court found and adjudged that there was no agreement of partnership entered into at the time and place specified or at any other time or place.

Transcript, pages 77-83.

The conclusion is irresistible, at least the theory is admissible, under the evidence, that the respondent was claiming to be entitled to share in the profits accruing to appellant on account of the sale as a partner.

Under the terms of the settlement he was to have \$12,000 and \$25,000 worth of stock, he said.

Transcript, pages 33, 34.

The "note" was given pursuant to the agreement so made, the respondent testified. He says explicitly:

"At the time I received this note for \$12,000 I had agreed with him that I should receive that \$12,000 and also \$25,000 worth of stock, and that was acceptable to me."

Transcript, page 57.

Notwithstanding the agreement so testified to, he brought the suit to recover one-third of \$125,000, his alleged share of the partnership profits, being the very claim in alleged settlement of which he asserts he had agreed to take \$12,000 and \$25,000 of stock, the "note" in suit being given in evidence of the cash obligation, the stock never having been delivered. The institution of that suit was undeniably repudiation of the "settlement". He says that he never accepted the note except "conditionally," conditioned upon his also receiving the stock promised him.

Transcript, page 36.

Not having received the stock he began suit on the original consideration as he claimed it, for his share of the partnership profits.

In view of this testimony the appellant asked Instruction 7, quoted at pages 32-33 of the original brief, that if the respondent took the "note" pursuant to an agreement of claims asserted by him against the appellant, either as a partner or for the reasonable value of his services in connection with the sale, and then afterwards brought suit to recover, on either the one or the other claim, such

conduct would be a repudiation of the agreement and would preclude recovery on the "note".

As observed, the only ground urged when the court properly refused this instruction is that such a defense was not pleaded. The actual defense pleaded varies, however, in no material or substantial particular. The defense pleaded is identical with that established by the testimony of the respondent himself, except that he claims he was to receive stock in addition to the "note" under the settlement, and appellant claims that an essential part of the agreement was that he was to have a formal release and acquittance from respondent and Kerrigan which would have been available to him in the partnership action. The essential thing is that the "note" was given either partly or wholly in satisfaction of an agreement of settlement entered between the parties, and that the respondent, disregarding the settlement, proceeded to sue upon the original consideration. The defense pleaded is made out, in substance, by the testimony of the respondent himself.

The motion for a non-suit on that ground,

Transcript, pages 134-136,

should have been sustained. Certainly the jury should have been instructed that the existence of such facts would require a verdict for the defendant. There cannot be said even to be a vari-

ance, much less a fatal variance, between the proof and the pleading—the special defense.

The respondent likewise relies on

State v. Byrd, 41 Mont. 585.

But let it be supposed that the facts shown in evidence touching the consideration of this “note” are essentially different from those pleaded as a defense against its enforcement. What of it? The defendant in an action sets up that a note sued on is without consideration and recites what he claims to be the true story of its execution, which, if true, sustains his claim of want of consideration. The plaintiff denies the truth of the defense and proceeds to tell upon the witness stand what he claims to be the correct history of the transaction. The story told by him is altogether at variance with the claim of the defendant.

He refutes it utterly, but his own story discloses that he has no right to recover on the note. Is the defendant to be turned out of court, and the plaintiff given a judgment on an instrument on which he has no right to recover whether his own story be true, or that of his antagonist, because the latter did not plead the facts to which he testifies?

The appellant did not plead the facts to which the respondent testifies—only, however, as to the \$25,000 worth of stock—because he could not truthfully verify an answer which set them up. But he is by no means precluded from taking advantage

of a defense which may inhere in the testimony as it comes from the mouths of the respondent and his witnesses. Pleadings are required in order to advise opposing parties of the character of the evidence their antagonists will offer. They are not intended to fit facts which come from the opposing party.

The principle is a well-recognized one. To admit evidence to show that a contract is void as against public policy, the defendant must specially plead its invalidity. But though no such defense is made in the answer, the defendant is permitted to assert the claim of the facts which make it out appear from the plaintiff's testimony.

9 Cyc. 740-742.

Almost universally the American courts hold that contributory negligence is an affirmative defense, not available unless pleaded. Yet it is generally, if not uniformly, held that if contributory negligence appears by the plaintiff's own testimony, he should be non-suited though the answer sets up no such defense.

1 Thompson's Commentaries on Negligence, 369.

The following is quoted from

Hudson v. Wabash, 14 S. W. 11-19:

"While contributory negligence as a matter of defense has to be pleaded in order for a defendant to avail himself of it by the introduction of evidence to sustain that issue, yet it



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does not thence follow that, if the plaintiff's own testimony shows circumstances of contributory negligence which absolutely defeat his right of action, and disprove his own case, that the defendant is not at liberty to take advantage of such testimony, though produced by the adversary. On the contrary, it is well settled in this state, as well as elsewhere, that such advantage may be taken of the plaintiff's testimony, regardless of whether the special defense be pleaded or not. *Milburn v. Railroad Co.*, 86 Mo. 104, and cases cited; *Schlereth v. Railway Co.*, 96 Mo. 509, 10 S. W. Rep. 66. When this occurs, it is the duty of the trial court to declare this result to the jury as a matter of law. 1 *Shear. & R. Neg.* (4th Ed.) Secs. 56, 112, note; 2 *Ror. R. R.* 1054, 1055."

And when an inference of contributory negligence is necessary or admissible from the plaintiff's own testimony, an instruction on that feature of the case should be given though no such defense is pleaded.

*Pim v. St. Louis T. Co.*, 84 S. W. 155.

It is apprehended that if a plaintiff sued on a promissory note and told in the course of his testimony that it was paid, the court would be not only justified but required to instruct the jury that no recovery could be had upon it though there was no plea of payment.

And it must be so with reference to every meritorious defense not personal, or which the statute does not declare to be waived, like the statute of limitations, unless pleaded.

The court was bound, accordingly, to entertain

the point urged both by the motion for a non-suit and by Instruction VII, even though it was not covered by the special defense.

*Instruction VIII.* It is perfectly idle to pretend that the legal principle embodied in this instruction is found in Instruction II given by the court. That instruction was requested by appellant as his Instruction No. 2.

Transcript, page 231.

The court must find that appellant requested two instructions in language essentially different but meaning one and the same thing.

The earlier one tells the jury that they cannot return a verdict for the defendant though they should believe that something was due to the respondent from appellant, either as a partner or for services rendered—that there could be no recovery unless the jury should find the respondent entitled to recover on the note. To elucidate. It is claimed by the appellant that the note in suit was never delivered,—that is, that it was never accepted by the respondent. And it is submitted that no other conclusion can fairly be drawn from the testimony of the respondent. He swore unequivocally to that effect the first time he told his story,

Transcript, pages 213, 227,

and his futile attempt to deny that he did was overthrown by the testimony both of the stenographers and the judge before whom it was given.

Transcript, page 224.

If this defense to the note was made out, or any other defense for that matter, the jury was in effect told by Instruction 2, there could be no recovery though they might believe the respondent ought to have something either for services rendered or as a partner.

Now by Instruction VIII, as requested, the attention of the jury is directed to the consideration for the note. And they are told that if it had no consideration except what was supposed to be due to respondent as a partner in the sale of the Butte and Balaklava claims, the note was without consideration, as it had been determined and adjudged that there never was anything due to the respondent on account of any agreement of partnership, and that no agreement was ever entered into between the parties.

It is simply cavilling to contend that this instruction called upon the jury to speculate as to what a partnership is or to vex their minds with the problem as to whether a mining partnership or a law partnership was not referred to. The instruction specified referred to a partnership in connection with the Butte and Balaklava claims or the effort to procure a purchaser for the same. The respondent, in his testimony, repeatedly referred to the obligation in consequence of which the note was given as one that grew out of his being *a partner* with appellant in the sale of the Butte and Balak-

lava claims. The court may properly use his language in instructing the jury without laying itself open to a charge of failing to give a legal definition of one of the terms he employed. The effort of counsel in this connection is to leave the impression that in the partnership suit some grave doubt arose, by reason of its peculiar provisions, as to whether a contract which it is assumed was concededly entered into was technically an agreement of partnership, and that the learned trial judge held, contrary to the views of counsel, that it was not. The fact is that the court held that no agreement was entered into at all. If any agreement such as claimed by the respondent was entered into at the time and place claimed by the respondent it was conceded to be, as it unquestionably was, an argument by which the parties hereto became partners. The court held, however, that no agreement at all was entered into between the parties at the time or place claimed by the respondent, that no such agreement was ever entered into at any time or place, and that the entire contention of the respondent touching the relationship between himself and the appellant by the assertion of which he got the note in suit, was a fraudulent fabrication. The opinion of the learned judge who tried that cause found in the record makes this proposition entirely clear.

Transcript, pages 77-84.

*Instruction IX.* The only trouble with this instruction, said to be insensible, is that in some way the word "and" had crept into the printed transcript after the comma in line 9. Omitted it requires no keen intelligence to comprehend the language. The evidence fully justifies the belief that the respondent was asserting some kind of a claim; likewise that some kind of a settlement was made between the parties. The respondent claimed that under that settlement he was to receive this note and \$25,000 worth of stock. He said he accepted the note "conditionally," conditioned on his getting the stock. He did not get the stock. He claims that the appellant violated the agreement of settlement, that is to say, did not perform it, by delivering the stock. That gave the respondent a right of election, either to keep the note and force the delivery of the stock or to recover damages for its non-delivery or to repudiate the entire settlement and sue upon the original consideration. When he took the latter course he forever abandoned the right to pursue the former.

Clews v. Rielly, 6 N. Y. S. 640.

Rowell v. Marcy. 47 Vt. 627.

The instruction complained of asserts this undoubted rule of law.

*Instruction X.* This instruction told the jury that if the note in suit was given pursuant to any agreement between the parties to avoid litigation,

and notwithstanding the agreement the respondent started the litigation to avoid which the agreement was made, there could be no recovery on the note.

There are two criticisms made of this instruction.

It is said, in the first place, that the answer avers that the respondent and Kerrigan had been threatening appellant with *trouble* on account of an alleged liability of appellant to them, growing out of the sale of the Butte and Balaklava,

Transcript, page 13,

and that in view of such threat of *trouble* that the note was given. It is insisted that the instruction is wrong because the averment is of a threat of trouble, not a threat of litigation. Most people find litigation directed against themselves a trouble rather than an entertainment or diversion. The greater (the term used in the pleading) includes the less (the term used in the instruction). But if it did not, the variance is trivial and the argument trifling.

In the second place, it is contended that there was no evidence justifying the submission of the question as to whether the note grew out of a probability of litigation to be precipitated by respondent—that appellant testifies that his disposition was to do the contrary.

Reference is made to a conversation testified to by appellant had between him and respondent, not

before, but after the note was executed, in which the respondent was accused by appellant of purposing, notwithstanding his agreement, to bring suit. He retorted that he was not, but the colloquy could not have been reassuring,

Transcript, Page 153,

and the fact that suit was speedily thereafter instituted by him excites a violent suspicion of the disingenuousness of his protestation. Whether the note was given to avoid litigation is to be determined, not from the conversation pointed out by the brief of respondent, but by that recited in the

Transcript, pages 149-150.

Then it is said the instruction is covered by Instruction 5 given by the court, but that part of the charge presents the contention simply that the note was given upon the express condition that a release was to be executed by respondent and Kerrigan and delivered to appellant. Under the instruction requested, the defendant would be entitled to a verdict, as he undoubtedly would be did the facts recited in it exist, though the jury should find that there was never a word said about a release or an acquittance or discharge.

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The record is searched in vain for any consideration for this note other than an abandonment of a claim which respondent was asserting to participate in the profits of the sale of the Butte and Balaklava

as a partner or joint adventurer in that transaction with the appellant. Let the counsel for the respondent tell the court frankly and with candor what other consideration it had? It is absurd to answer that it was given in payment or part payment of the reasonable value of services rendered by the respondent in connection with the sale.

The work done by the respondent in that connection and his participation in the negotiations leading up to the sale are related in this record substantially as they were shown by the transcript on the first appeal. They are reviewed by the court in its opinion at pages 52 to 54, 40 Mont.

He was required this time to specify in detail.

Transcript, pages 52-56.

For this work the appellant has already paid him \$700.00.

Transcript, page 57.

If the court should address to counsel for the respondent any inquiry as to what was in truth the consideration on this note what could they say? What answer could they give on this record that does not at once disclose that no recovery can be had upon it, but also that it is tainted with a vice worse than want of consideration?

We respectfully submit that on the facts disclosed by this record a verdict for the respondent cannot be sustained.

JESSE B. ROOTE,  
WALSH & NOLAN,  
Attorneys for Appellant.







40 Mont. 418.  
107 Pac. 81.

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IN THE  
**Supreme Court**  
OF THE  
STATE OF MONTANA

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THE COUNTY OF SILVER BOW,

*Respondent,*

vs.

WILLIAM E. DAVIES and AMERICAN BOND-  
ING COMPANY,

*Appellants.*

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BRIEF OF APPELLANTS.

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I.

STATEMENT OF CASE.

The respondent began this action to recover on the official bond of the appellant William E. Davies, given as clerk of the District Court of the Second Judicial District of the State of Montana, in and for Silver Bow County, the other appellant being his surety.

The complaint alleges that one W. P. Farrell was chief deputy under the appellant Davies, and that during the time that he was acting as such he issued "false, bogus, fraudulent and fictitious juror cer-

tificates and witness certificates amounting to \$11,171.60," which being presented to the County Treasurer of Silver Bow County were paid out of its funds.

Transcript, pages 5-15.

A demurrer was interposed and overruled.

Transcript, page 16.

Thereupon an answer was filed, by which the execution of the bond was admitted, the deputyship of Farrell, and that he issued spurious certificates in the amount asserted in the complaint. It was averred, however, that none of the spurious certificates issued by him had the seal of the court attached, and that the County Treasurer was not authorized to pay out any money on account of them; that they were void on their face, and were issued by Farrell individually and not as an officer of Silver Bow County.

Transcript, pages 17-21.

The reply admitted that the certificates in question did not bear the seal and averred that, notwithstanding, they were paid by the Treasurer in accordance with a custom not to seal such instruments, which custom was well known to and acquiesced in by said William E. Davies.

Transcript, pages 23-24.

A motion to strike from the reply this averment of custom was denied by the court.

Transcript, 25-29.

The case came on for trial, and objection was made to the introduction of any testimony on the ground that it appeared from the pleadings that the certificates were void on their face for want of the seal, and constituted no warrant to the treasurer to pay out any moneys on account of them.

The objection was overruled and the various spurious certificates admitted.

Transcript, page 37.

It appeared that they were issued to fictitious persons for services purporting to have been rendered as jurors and witnesses. The endorsement of the payee was then forged upon each by Farrell, and the certificates, or most of them, came into the possession of various banks to which they were paid by the County Treasurer.

Transcript, pages 204-205.

At the close of the testimony, over objection and exception, the court instructed the jury to return a verdict for the plaintiff, which was done.

Transcript, pages 223-226.

And judgment was rendered, accordingly, against the appellants for \$10,796.60, with interest.

Transcript, pages 32-34.

This appeal is taken from the judgment so entered.

Transcript, page 250.

## II.

## SPECIFICATIONS OF ERRORS.

1. It was error in the court to overrule the demurrer to the complaint.

2. It was error in the court to overrule the appellants' objection to the introduction of any evidence at the trial.

3. It was error in the court to instruct the jury to return a verdict for the plaintiff.

4. It was error in the court to enter any judgment herein, for that the complaint does not state facts sufficient to constitute a cause of action, and because the reply admits that the certificates in question did not bear the seal of the court.

## III.

## ARGUMENT.

The facts upon which this action is founded were before this court in

In re Farrell, 36 Mont. 254.

Farrell was convicted and sentenced to serve long terms in the penitentiary for the forgery of two of the jurors' certificates introduced in evidence, but was released from custody by this court, in the proceedings referred to, on a writ of habeas corpus, the court holding that the instruments were void on their face for want of the seal of the clerk, and, for that reason, were not the subject of forgery.

Only jurors' certificates were before the court in that case, but, for the reasons advanced in the



opinion, the witnesses' certificates also involved here were equally invalid. They were issued, presumably, under the provisions of Section 4621 of the Political Code, as follows:

"The clerk of any court before which any witness shall have attended on behalf of the state, or county, in any civil action, must give to such witness a certificate, under seal, of travel and attendance, which shall entitle him to receive the amount therein stated from the state or county treasurer."

In various ways there is presented by the record the question as to whether, in view of the holding of this court in the case referred to, and the very satisfactory reasons upon which it is based, the clerk of the court and his surety can be held liable for the money paid out of the county treasury in supposed satisfaction of these certificates.

Whatever view the court may take of the matter, to be canvassed hereafter, the complaint is insufficient to support the judgment, and the court should have sustained the demurrer to it. The gravamen of the complaint is expressed in the seventh paragraph thereof, in which it is charged that "Farrell issued false, bogus, fraudulent and fictitious juror certificates, which juror certificates represented upon their face in the aggregate the amount of nine thousand five hundred sixty-seven dollars." Then follow similar averments as to the witness' certificates, and then it is averred that being presented to the County Treasurer of Silver

Bow County for payment, they were paid out of that county's funds in his hands.

It will be observed that no information is given as to the character of these certificates, or what they recited, or how they were signed, or to whom they were addressed. It is simply known that they were jurors' certificates and aggregated \$9567. They were "issued" by Farrell, but whether signed by him or not, the complaint does not say. One may "issue" forged paper though he does not forge it. The crime of forging a document is quite distinct from the crime of "issuing" such an instrument. It does not appear but that they purported to have been issued by the clerk of Jefferson County and may have been directed to the Treasurer of Meagher County. If the certificates were, indeed, executed after the manner of certificates showing an indebtedness of Silver Bow County, on account of juror's or witness' fees, but were directed to the County Treasurer of Meagher County and were paid by that officer, it seems reasonably clear that neither the clerk nor his sureties could be held first, for the reason that it was beyond the scope of the duties of the office of the deputy clerk of the district court for Silver Bow County to issue requisitions on the treasurer of Meagher County, and second, because the proximate cause of any loss to Meagher County would be the gross negligence of its own treasurer in paying such a certificate and not the original issuance of it. And if the treas-



urer of Meagher County should seek to recover from the clerk or his bondsmen, it would be a complete answer to say, "Your loss was the result of your own culpable negligence. You ought to know and did know that you had no right to pay any certificate on you drawn by the clerk of the court of Silver Bow County or any of his deputies." And plain equity would demand that so careless a public servant should not be permitted to saddle upon the innocent clerk, though he had a faithless and rascally deputy, the loss which the Treasurer of Meagher County suffered by reason of his own culpable carelessness.

Nor if the certificates were addressed to the Treasurer of Meagher and paid by the Treasurer of Silver Bow, would the latter be in any better situation? It would be a perfectly voluntary act on his part to pay any such instrument. It was not addressed to him, and he knew or ought to know that the deputy clerk of Silver Bow was without authority to issue such a certificate to the Treasurer of Meagher. Why should he be permitted to force reimbursement from the clerk or his official bondsmen? His loss is primarily the result of his own negligence, as is the loss of the county, if any loss should be sustained by it.

These reflections are made as well to enforce the view that the complaint is fatally defective in failing to show the character of the certificates, as to

introduce the main contention of the appellants that the act of the deputy clerk was not the proximate cause of the loss to which the county may have been subjected by the payment of these certificates. They offered no justification whatever to the County Treasurer for the payments made by him, and afford him, and consequently the county, no basis for an action against the clerk or his bondsmen. If he sued the clerk, the latter could very properly say,—“You had no right whatever to pay these certificates. They were utterly void, as you ought to know. Your loss is attributable to your own negligence and disregard of law.”

In the Farrell case the court said:

“The treasurer cannot act until the clerk has performed his duty. The clerk must, therefore, perform his duty in the way prescribed. If the latter issues false certificates, he violates his duty. If the former pays upon any other demand than that prescribed, he does the like.”

It declared that “the certificates in question are of no actual or apparent legal validity.” They afford to the Treasurer of Silver Bow County no more justification for the payment by him of funds of the County of Silver Bow than would certificates issued by the clerk of that county, as supposed, to the Treasurer of Meagher County.

If once it be held that the clerk is liable for payments made by the treasurer upon certificates void on their face, there is no halting place, and the court must hold that any kind of a paper, emanat-

ing from the clerk's office, by the aid of which the treasurer can be inveigled into paying county funds, must make that officer and his bondsmen liable.

We can easily imagine that officer paying an instrument in form a certificate, but wanting both the seal and the signature of the clerk; or wanting wholly in recitals as to the purpose for which they were issued. Indeed in this very case it appears that some of the certificates were so hastily, inartificially and carelessly prepared, as not to contain a recital, as required by the statute, of the number of days' service rendered.

These instruments have no more force or efficacy in the law than if they were blank pieces of paper. The county treasurer could have no credit in his settlement with the county on account of any money which he paid out on them, as this court showed in the Farrell case by reference to

**McCormick v. Bay City, 23 Mich. 457.**

In order to entitle the plaintiff to recover in this action, it is necessary not only to show the wrongful act of the deputy clerk and its loss, but that the relation of cause and effect existed between the two,—the former must be the proximate cause of the latter. That it is not, is clearly shown by the case of

**Oakland Savings Bank v. Murfey, 9 Pac. 843.**

In that case one Leroy introduced himself to the

defendant, a notary public, as one West, the owner of a tract of land described in a conveyance purporting to be executed by the latter to one Harmon. The notary took his acknowledgment to the deed, certifying in the usual way that he knew the grantor, and that he acknowledged the execution. Leroy then took the deed to a bank, and representing himself there to be Harmon, in that name obtained a loan from the bank and gave to it a mortgage to secure the loan on the property mentioned in the deed. The facts being developed, the bank brought the action against the notary and the sureties on his bond, to recover on account of the false certificate to the deed. The Supreme Court of California held that there was no right of recovery, saying *inter alia* :

"Murfey was guilty of negligence as a notary in taking the acknowledgment of the *pseudo* West as a grantor in a deed without personal knowledge or proof of his identity, and for such neglect he and his bondsmen are liable to those damnified thereby. Did the damage which resulted to plaintiff follow as a proximate and legal result of the negligence of the notary, or was it the negligence of plaintiff that was the direct and proximate cause of the loss and damage sustained by it? The court below finds that plaintiff was guilty of carelessness and negligence, and that such negligence was the proximate cause of its loss. \* \* \*

"In the case at bar we have the spurious deed executed by a pretender in the name of West, and negligently certified by Murfey, the notary. In other words, we find the defendant Murfey *in fault*. This, however, did not absolve the plaintiff from the exercise of ordinary care. Could the plaintiff by the exercise of

such ordinary care have avoided the consequences of the defendant's negligence? We think this question must be answered in the affirmative. *We may even go further, and add that we do not see how the negligence of defendant was the direct and proximate cause of the injury to plaintiff.* \* \* \*

"Plaintiff's negligence was the proximate cause of such injury, that is, it was in the order of causation next to and produced the result. It must not be understood that the negligence of defendant was not one of the *conditions* of the injury to plaintiff. On the contrary it constituted a condition, in the order of causation, by which plaintiff's injury was brought about. \* \* \*

"For remote or secondary causes men are not responsible. *Causa proxima, non remota spectatur.* It may with propriety, we think, be said that plaintiff had a right to rest upon the presumption that a public officer, who is shown to have performed an official act, has done so properly; but if the evidence stops short with showing that he was guilty of negligence, and fails to show that plaintiff was injured thereby, or if it proceeds further, and shows an injury sustained, but which was not the proximate result of such negligence, but was the natural and proximate outgrowth of some new and independent act or acts of negligence on the part of the plaintiff, there can be no recovery."

The principle of this case was applied in

Hatton v. Holmes, 31 Pac. 1131.

In that case the plaintiff was induced to loan \$1000 on a mortgage purporting to have been executed by one Keifer and wife. He gave to the party negotiating the loan, who represented himself as the agent of Keifer, his check payable to the latter for the amount of the loan. The spurious agent then forged the endorsement of Keifer on the

note and obtained from the bank on which it was drawn, the money it called for. It transpired that the mortgage was a forgery, and the mortgagee began the action against the notary who certified to its execution by Keifer, to recover the amount of the check given by him and which the bank charged to his account. He was denied any relief, the court holding that the proximate cause of his loss was the wrongful act of the bank in paying the check on a forged indorsement. But it held further that it had not been shown that he did suffer any loss,—that the bank had no right to debit his account with any amount paid by it on a forged indorsement, and that he could sue and recover of the bank.

So here, the proximate cause of the county's loss is the wrongful act of the treasurer in paying out its money, not only upon a forged indorsement, but upon an instrument which never did have any validity. No averment is found in the complaint, and no effort was made at the trial to establish that the treasurer was not amply able to respond to any proper demand which the county might have against him, nor that his bond would not fully care for any deficiency there might be in his accounts. Yea, more. It appears that the sums paid went into the hands of various banks which purchased the spurious certificates and obtained the sums paid on the forged indorsements. They acquired only such rights as the original holders enjoyed, the instruments not being negotiable, which was nothing.

Even if they had been negotiable, the parties receiving payment of them would be obliged to refund whatever was paid on the forged indorsements.

2 Daniel on Neg. Inst. 1369.  
Fraker v. Little, 36 Am. Rep. 262.  
22 Am. & Eng. Ency. 264.

It is not shown that the county has suffered any loss, and it appears that if it has, the proximate cause of that loss was the negligence of its treasurer in paying out money, not only on a spurious indorsement, but on an instrument that was void on its face.

The remoteness of the wrongful act of the deputy in reference to the loss of the county, if it did sustain loss, is evidenced by the following:

Suppose when the banks presented these certificates for payment, the treasurer had refused to pay, asserting that they were not only void *ab initio* for want of the seal, but the indorsement was a forgery. Could any of the banks have recovered of the clerk or his bondsmen anything they may have paid for the certificates? Clearly not. He would have said, "Your loss is due to your own negligence in buying such an instrument, particularly without inquiring as to the genuineness of the indorsement."

The case of

Whyte v. Mills, 8 So. 171,

was similar to the one supposed. The defendant

was clerk of the court and of the board of supervisors. He entrusted the business of his office to a deputy who issued county warrants, to which he attached the signatures of the clerk and the chairman of the board (the latter being forged, of course) and the clerk's official seal. He then issued the warrants, some of which were bought by the plaintiff. The treasurer refused to pay them and the holder began the action against the clerk, but the court refused to hold that officer liable.

The proposition attempted to be elucidated is brought out in an early Alabama case.

Governor v. Wiley, 14 Ala. 172.

A *fieri facias* was put into the hands of the sheriff. He was proceeding to execute it when he was served with what purported to be a writ of injunction issuing from the office of the register, commanding him to desist. It appeared that the register had assumed the authority to issue the writ without any order of the court, the law expressly providing that though he might issue certain writs in vacation, he could neither grant nor dissolve an injunction. The creditor having lost his claim by reason of the interruption of the proceedings for the enforcement of the judgment, the sheriff having desisted upon the service of the restraining writ upon him, he brought suit against the register and his bondsmen. He was denied a recovery, the court saying that the supposed writ of injunction was void on its face, be-



cause containing no recital that it was issued by direction of the proper authority, namely, by virtue of an order of the court, and that the sheriff should have paid no attention to it. The case held, in effect, that the proximate cause of his loss was the negligent act of the sheriff in omitting to execute the *fieri facias*, without any legal excuse, and not the act of the register in issuing the void writ.

Of course, if the writ had been apparently valid, if it contained a recital that it was issued pursuant to order of the court, the sheriff would be under no obligation to go back and search the records of the clerk's office to ascertain the truth of the recitals, but being void on its face, the court held that he should have proceeded, notwithstanding, to collect the judgment.

Reference was made by the learned and painstaking judge who tried the case below, in support of his views of the rights of the parties as implied in the judgment, to the case of

Lewis v. State, 4 So. 429,

and to two Illinois cases to be referred to hereafter.

(See Trans. pages 28-29.)

The Lewis case is readily distinguishable in that the warrants there under consideration bore both the *seal* and the signature of the clerk; that is, they were apparently valid warrants. They were of the

same character as those which formed the basis of the prosecution in

*In re Terrett*, 34 Mont. 325.

It is not expressly stated in the recital of the facts in the *Lewis* case that the instruments bore the clerk's seal, but that is fairly inferable from the following language of the opinion: "A public officer, charged as *Bracey* was, with the function of issuing claims against his county in certain cases, who wilfully lends his *official seal* and signature to false and fraudulent claims against the county, by which it is defrauded, cannot be said to have faithfully discharged the duties of his office."

The Illinois cases (the facts were essentially the same in both),

*Campbell v. People*, 39 N. E. 578;

*Spindler v. People*, 39 N. E. 580,

are not, as the appellants insist, with all deference to the discriminating judge who tried the case, by any means, as he says, "on all fours" with the one before the court.

A most horribly loose system, apparently, prevailed in the financial affairs of the county in which those cases arose. The law did not require the warrants to be sealed, but provided that they should be countersigned by the treasurer, who should first examine the records in the clerk's office to see if they were authorized by the act of the county board. Being so authenticated, it was contemplated that the orders should be sent to the

payee and collected by him or his assignee. But a custom grew up for the clerk to present the warrants to the treasurer, receive the money on them, and remit the money to non-resident creditors, the treasurer making no search of the record antecedent to payment. This system, or utter disregard of system, gave the clerk opportunity to present warrants never authorized by the board, the avails of which, as he received them from the treasurer, he converted.

It will be noted, with respect to these certificates, that when they left the hand of the clerk they were complete so far as he was concerned, so as to make them apparently valid charges against the county. Neither he nor any officer other than the treasurer himself was required to do anything in order to make one of them prima facie evidence of an obligation of the county. He had issued what purported to be a valid obligation of the county, calling for payment. If he had indeed been, as he represented himself to be, the agent of the payee to receive payment, it was not necessary to do anything more, nor to procure anything more to be done, than to hand it to the treasurer. In the case of a valid claim, he might have delivered it to the payee and on the latter's presenting it in that form to the treasurer, that officer must pay it after satisfying himself, by search of the record, of its having been authorized by the board and attesting that he had made satisfactory search, by countersigning the instrument.

In fact, in the Spindler case, the warrants were made to the delinquent clerk himself. He was entitled to payment of warrants, properly drawn, to himself, upon the presentation of the same to the treasurer.

While the cases are thus readily distinguishable from the one at bar, it is the opinion of the writer that the court did not give to the subject of proximate cause the consideration to which its importance entitled it. In fact, the court manifested some indisposition squarely to face the question. It says in the opinion that the acts of the clerk "were the *dominant* and *efficient* causes for the losses" of the county. It seems purposely to avoid the use of the word "proximate" because it cannot be obscured that the "proximate" cause was the negligence of the treasurer in accepting the clerk's express or implied representation that he was the agent of the payee in the case of orders not drawn to himself, and in not searching the records to obtain official assurance of the validity of the warrants. Had the court considered the question of proximate cause with the attention and care that was observed by the California court in the Oakland Savings Bank case, it is not improbable that it would have reached a different conclusion.

Such a conclusion would not only more closely conform to the principles of the law, but would enforce a greater circumspection, a more attentive consideration to the admonitions of the law on the

part of public disbursing officers. It has a perfectly obvious tendency to lessen their vigilance if the county may proceed as well against the sureties of the recreant officer who fraudulently issues the void warrants.

The equities are all with the sureties in such a case. In this particular case they are doubly so. The clerk of the court might, anticipating that some of his deputies might undertake just such a fraud as was perpetrated in this case, say to himself,—“In order to guard against anything of that kind, I will keep the seal under my own individual hand. I will keep it locked up at all times save when I am not at the office, and at such times I will have it in my own personal custody. I will myself seal all instruments issuing from the office and requiring a seal. Thus I shall have personal knowledge of every valid writ and certificate issuing from the office. The treasurer will pay no certificate not attested with the seal, and I shall thus be secure.”

There is no reason to believe that the clerk in this case did not so resolve and act accordingly. But if the facts were otherwise, the conclusion which we must reach cannot be different. The court could not hold a clerk who did so, exonerated, and one who did not, liable, when the certificates issued and paid were identical in character in both instances.

No importance can be attached to the averment that it was the custom of the clerk's office to issue witness' and juror's certificates unsealed, and for

the treasurer to pay such worthless certificates. Evidence of such a custom would have to be excluded under the perfectly well established rule that "a usage in conflict with plain, well established rules of law is not admissible in evidence in any case, and must be disregarded."

Cox v. O'Riley, 58 Am. Dec. 633.

"Nor will proof be heard," says the Supreme Court of Indiana in

Van Camp Packing Co. v. Hartman, 25 N. E. 901,

"of a usage that is contrary to public policy, or good morals, or to the common or *statute law*."

It scarcely calls for demonstration that a legal right cannot be founded on a custom or usage that is contrary to the express command of the law.

But whatever force or effect this so-called custom may have as against the appellant Davies, it is not even averred that his co-appellant had any knowledge of its existence, or that the treasurer of the county was paying warrants issuing from the clerk's office not authenticated as the law required, in order to give them validity.

If it had taken the precaution to arrange with the clerk for whom it became surety that he should keep constant custody of the seal himself and that compact had been observed, it is scarcely to be conceived that any court would hold it liable. It would have a perfect right to assume that no cer-

tificates not bearing the seal would be paid by the treasurer. And if they were, the burden and the loss ought, in equity and under the law, to fall on him and not on it.

Inasmuch as the certificates which were paid were just such as would have been paid had such an agreement between it and its principal been entered into, it is equally unjust and violative of sound principles of the law that it should be held in the absence of such an arrangement.

The county should be relegated to its plain and ample remedy against the treasurer, and he to his right to recover from the parties who obtained from him the amounts of the bogus warrants.

Respectfully submitted,

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40 About. 418.  
107 Pac. 81.

813

IN THE  
**Supreme Court**  
OF THE  
STATE OF MONTANA

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THE COUNTY OF SILVER BOW,

Respondent,

v.

WILLIAM E. DAVIES and AMERICAN BOND-  
ING COMPANY,

Appellants.

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BRIEF OF RESPONDENT.

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Appellants set out four specifications of error in their brief. (Appellant's brief p. 4.) The appeal in this case is from the judgment only, and as the second bill of exceptions was prepared in support of the motion for a new trial, and as the first notice of intention to move for a new trial was served before the entry of judgment, and the second notice of intention to move for a new trial served more than ten days after the entry of judgment and the bill of exceptions prepared in support of the motion for a new trial is not made a part of the judgment roll, it follows that the matters contained in the bill of

exceptions to be used on motion for a new trial are not properly a part of the record on the appeal from the final judgment. Therefore, specifications of error numbers 2 and 3 relate to matters which do not properly appear in the record on appeal from the judgment.

However, specifications 1 and 4 raise practically the same questions that are attempted to be raised by specifications 2 and 3, and we shall confine our argument in this brief to the errors alleged in specifications 1 and 4. In fact, the argument in appellant's brief relates only to the questions raised by specifications 1 and 4.

## I.

Appellant contends that the respondent's complaint is insufficient because it does not expressly allege that Farrell signed the jurors and witness certificates, therein referred to; and, because it does not expressly allege that they were issued by the clerk of the court of Silver Bow county; and does not expressly allege that they were directed to the treasurer of that county.

The complaint first alleges that William E. Davies was duly elected to the office of clerk of the district court of Silver Bow county, and that he thereafter made, executed and delivered his official bond and took the oath of office and entered upon the discharge of the duties of the office, and was,

at all the times mentioned in said complaint, the duly elected, qualified and acting clerk of such court. It further alleges that W. P. Farrell was the duly appointed, qualified and acting chief deputy clerk of the district court of Silver Bow county, Montana. It also alleges that the said W. P. Farrell, during such time "as deputy clerk of said district court, issued certain false, bogus, fraudulent and fictitious witness certificates," and that thereafter said certificates were presented to the county treasurer of Silver Bow county, Montana, for payment, and were by said county treasurer of Silver Bow county, Montana, paid out of the funds belonging to the county of Silver Bow.

We submit that said allegations are clearly sufficient, under section 6566, revised codes, to show that such certificates were signed by Farrell and were directed to the county treasurer of Silver Bow county.

In the case of *Mallory v. Benway*, 75 Pac. (Wash.) 869, the supreme court, in construing a complaint under a statute the same as said section 6566, said:

"It is also a general rule under the Code of Procedure that the allegations of a pleading are to be liberally construed, with a view to substantial justice between the parties. 'Under favor of this rule, whatever is necessarily implied in, or is reasonably to be inferred from, an allegation, is to be taken as if directly averred.'"

See, also:

Baylie's Code Pleading (2d Ed.) pp. 48, 49  
and 102 to 105.

And this author, on page 49, cites a number of examples where matters were necessarily implied from allegations contained in the complaint.

See, also:

31 Cyc. p. 80,

for a collection of authorities on the liberal construction of pleadings.

In *Fire Ass'n of Phila. v. Ruby*, 82 N. W. (Neb.) 629, the court passed upon the sufficiency of an allegation that the defendants "entered into" the bond mentioned, and said:

"The term 'entered into' is of common use in legal phraseology, has a well-defined meaning, and is frequently found in statutes, opinions of courts and legal publications generally. \* \* \* We conclude, therefore, that the averment that the defendants entered into the obligation sued on its equivalent to the allegation that they executed the bond, and comprehends all acts essential to its making and delivery, and that the petition states facts sufficient to constitute a cause of action."

The terms "jurors certificates," and "witness certificates" have a well-defined meaning in law, and the manner of executing the same is defined in sections 3179 and 3183, revised codes. Also the word "issued" as used in the complaint has a well understood meaning in law, and includes not only the drawing and signing of the certificate but also

the delivering and putting of the same into circulation.

*State v. Pierce*, 35 Pac. (Kans.) 19;  
*Folk v. Yost*, 51 Mo. App. at p. 59;  
*American Bridge Co. v. Wheeler*, 76 Pac.  
 (Wash.) 534.

Therefore, when the complaint alleged that Farrell, "as chief deputy clerk of said district court, issued" certain witness certificates, which were presented to the county treasurer of Silver Bow county, Montana, it is necessarily implied that they were issued in accordance with section 3183, revised codes, and were directed to the only county treasurer in the state upon whom Farrell, as deputy clerk, would have any authority to direct a witness certificate.

The suppositions indulged in by counsel for appellant are so improbable and absurd as to be wholly unreasonable.

We submit that the demurrer to said complaint was properly overruled.

## II.

Counsel for appellant, in support of his fourth specification of error, relies upon two propositions:

First. That because the certificates issued by Farrell did not have the seal, and were, therefore, void and not the subject of forgery, that the clerk of the court, and his bondsmen, are not liable for loss sustained by the county because of the wrong-

ful acts of Farrell, as deputy clerk, in issuing such certificates;

Second. That because of the negligence of the county treasurer in paying these certificates, which did not have the seal of the court affixed thereto, that he, and his bondsmen, are liable to the county for the loss it sustained, and the clerk of the court, and his bondsmen, relieved from all liability.

Section 384, revised codes, provides that:

"The principal and sureties upon any official bond are also in all cases liable for the neglect, default or misconduct, in office of any deputy, clerk or employe, appointed or employed by such principal."

While the certificates issued by Farrell, as deputy clerk, were void and not the subject of forgery, still his act in issuing the same was clearly a default of his duty and misconduct on his part, for which his principal and sureties are liable. "The phrase, 'misconduct in office' is broad enough to embrace any wilful malfeasance, misfeasance, or nonfeasance in office." *State vs. Slover*, 20 S. W. (Mo.) 788. These certificates were false and fraudulent certificates, and the deputy clerk violated his duty in issuing them, and the fact that they were void and not the subject of forgery can not cure this violation of official duty. The act of Farrell in issuing these certificates was an act done by virtue of his office.

In *National Bank of Redemption v. Rutledge*, 84

Fed. 400, the rule is laid down in the syllabus of a well-considered case, as follows:

"Any act which, if done genuinely and honestly by an officer would be an official act, is, if done dishonestly and fraudulently, an act done by virtue of his office, and the sureties on his bond conditioned for the 'faithful discharge of the duties of his office' are liable for injuries resulting therefrom."

See, also:

Note in 91 Am. State Reports, at pp. 511, 512, for a collection of authorities on acts done by virtue of or under color of office.

This court in the case of *In re Farrell*, 36 Mont. 254, said:

"The treasurer cannot act until the clerk has performed his duty. The clerk must, therefore, perform his duty in the way prescribed. If the latter issues false certificates, he violates his duty. If the former pays upon any other demand than that prescribed, he does the like."

Nor does the fact that the county treasurer was negligent in paying these certificates, which did not contain the seal of the court, relieve the clerk of the court, and his bondsmen, from liability for the default and misconduct of his deputy in issuing such certificates.

91 Am. State Reports, pp. 497 to 579, contains an exhaustive note on the question of liability of sureties on official bonds. On page 530 the author of this note lays down the rule as follows:

"The fact, therefore, that the negligence, col-

lusion, or criminality of other officials has made possible or aided the default of the principal obligor in an official bond, or that but for their laches his defaults would have been earlier discovered, furnishes no defense to his sureties in an action on the bond."

Numerous authorities are cited in support of the above quotation.

In *Comm. v. Tate*, 13 S. W. (Ky.) 113, an action to recover of the sureties on the official bond of the state treasurer was brought. In that case the state treasurer's sureties attempted to make the same defense that appellant is making here; namely, that it was the negligence of the state auditor that caused the loss of funds to the state. In answering such contention the supreme court of Kentucky said:

"The law-makers attempted to hedge him in with safeguards, so that he could not steal without the theft being almost immediately discovered, and him deprived of his office, if the officer or officers, whose duty it was to look after him, did their duty; nevertheless he was required to give bond, with sureties, in a large sum that he would faithfully discharge his duties. Also the auditor was not the trusted supervisor of the treasurer; for he, too, was required to give bond for the faithful discharge of his duties. The fact that this officer might be negligent did not license Tate to steal. It nevertheless was his duty to be faithful and diligent, and the appellees covenanted that he would be. If it were true that the auditor's negligence made it imperative on Tate to steal, it might be, then, justly said that the appellees ought to be released. But the auditor's negligence did not have this effect. It was the duty of Tate not to steal, notwith-



standing the auditor's and secretary's negligence, etc., and the appellees covenanted that they would be responsible if he did. It was not the auditor's and secretary's faithful discharge of duty that was to guaranty that Tate would faithfully and diligently discharge his; but the appellees covenanted that they would guaranty that fact, and be responsible for his failure."

In *People v. Treadway*, 17 Mich. 480, the action was brought to recover from the sureties of the county clerk. His counsel, in Division 3 of their brief, p. 482, raised identically the same point that is now raised by appellant; namely:

"This latter officer, (the treasurer) is bound to know by what authority any money is paid out of the treasury; and if he pay any on orders improperly or improvidently issued, he must take the consequences. If the money was paid by the treasurer without authority of law, or without a proper warrant, the only recourse for the county is upon the treasurer, and his bail."

The court, in answering this contention of counsel, said:

"If the warrant in question was so suspicious on its face as to render the treasurer culpable for paying it, that does not lessen the fault of the clerk, or render his act any less official. It may involve another party in fault, but it leaves his own act unchanged."

In *Campbell v. People*, 39 N. E. (Ill.) 578, the facts were almost identical with those of the case at bar. The law involved in that case provided that the county clerk should issue county warrants, and that all such warrants must be countersigned

by the county treasurer before they were paid. The county clerk issued certain warrants which had not been authorized by the supervisors, and they were presented to the county treasurer and paid by him without being countersigned.

We submit that the failure to countersign such warrants was as fatal to their validity as the failure to put the seal upon the certificates issued by Farrell, which are involved in this case.

In that case counsel for the county clerk's sureties raised the same point that is raised by appellant here; namely, that the treasurer violated his duty in paying such warrants, and that, therefore, the bondsmen of the county clerk were not liable, and the county must look to the county treasurer.

The court in answering such contention said:

"In respect to the county orders involved in this suit, there was a failure on the part of the treasurer to perform either of these duties. He paid such orders without their being countersigned, and he paid them to a person or persons other than the payee or payees named in any of said orders. It is insisted that, because of these facts, the sureties on the bond of the county clerk are not liable. We think that the sureties on the bond of the county clerk are not released from liability for his malfeasance because of the negligence or misfeasance of the county treasurer."

This case was followed by the same court in *Spindler v. People*, 39 N. E. 580, and also in the case of *Estate of Ramsay v. People*, 197 Ill. 572,

and also in the case of *Greenburg v. People*, 225 Ill. 177.

*Lewis v. State*, 4 So. (Miss.) 429.

Counsel for appellant cites the case of *Oakland Savings Bank v. Murphy*, 9 Pac. (Cal.) 843, and *Hatton v. Holmes*, 31 Pac. (Cal.) 1131, and contends that such cases lay down the rule that should be followed in the case at bar. Such cases are clearly distinguishable from the case at bar, and from the cases heretofore cited in this brief. In the cases cited by appellant the party sustaining the loss was guilty of negligence, and the court held that on account of the negligence of plaintiffs they could not recover on the negligence of the party sued.

The case of *Oakland Savings Bank v. Murphy* was distinguished by the supreme court of California in the case of *Joost v. Craig*, 131 Cal., at page 510.

However, in the case at bar there is no negligence attributable to the plaintiff in the action; and, therefore, the doctrine of contributory negligence or proximate cause has no application whatever.

Counsel for appellant inserts some argument in his brief on the question of usage or custom of issuing jurors and witnesses certificates, and the payment thereof by the county treasurer without the seal of the court being affixed thereto. However, as such question is not raised in appellant's speci-

cations of error, and is wholly immaterial under the theory upon which this case was tried, and upon which it is now presented to this court, we shall not attempt to argue such questions further than to say that it does not appear that this custom or usage was pleaded for the purpose of establishing the validity of such certificates but merely to explain the character of the act and the intent of the parties in so issuing them.

See,

Subdiv. 12, Section 7887, Revised Codes;  
12 Cyc. p. 1053.

We respectfully submit that the judgment should be affirmed.

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